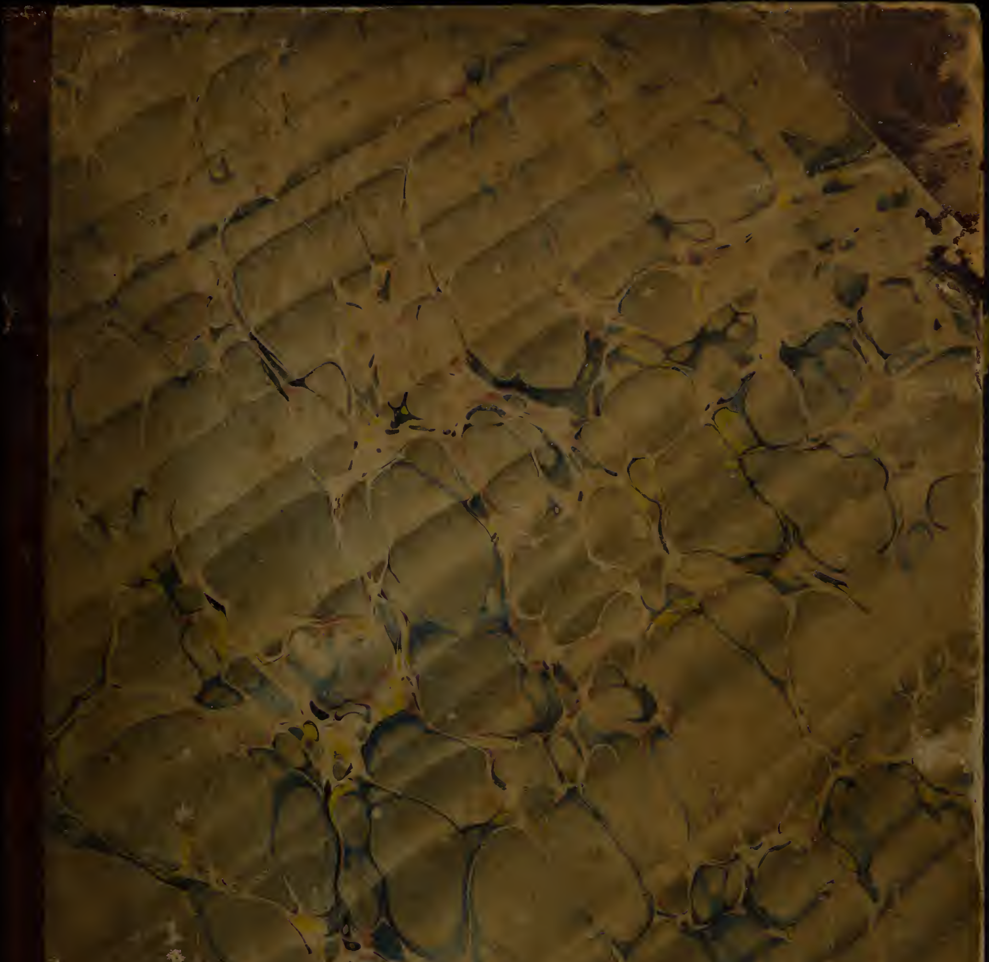

Gould, James, 1770-1838.

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(Notes of Gould's Lectures, delivered at the
Litchfield Law School, taken by Hiram
Gould Goodwin, a student in 1829)

Bailments

Bailment is said to be a delivery of goods on a contract expreſs or implied – to be redelivered when the object for which it is bailed is accomplished – Jones on Bail. 3. 48. 12 Mod. 4.82 –

Every bailment vests a special or qualified prop in the bailee – Jones on Bail. 12 Dr & St. 129. 7 Ter Rep 392. 398. (see 4 Coke 83. Co Lit 89.)

A mere lawful poſseſsion of goods gives in all cases a right of prop in the poſseſsor – 1 Strange 505 – 7 Ter Rep 392 – 397.

The bailee is not bound to restore the goods bailed in all cases – 7 Ter Rep 392. 397.

When the Bailee is liable & when not for loſs or injury is the great enquiry ~~in this enquiry title~~

The bailee is not liable for the goods entrusted to him unleſs he be guilty of some fault – & the faulty cause of the loſs –

To determine when the bailee is in fault – the bailt – & the nature of the goods bailed as well as the negligence of the bailee – is to be considered –

The first enquiry is the requisite degree of diligence required of the bailee – The bailee is bound to use the goods according to the nature of the bailt – under a general acceptance – which is ordinary care

The acceptance is said to be general when there is no special agreet by the bailee – in this case the law points out the degree of diligence

But when ~~he~~ a special acceptance is made the Bailee is bound to use diligence according to the nature & extent of the acceptance

There are three degrees of diligence – viz – in law –
1. ordinary care – which is a degree of care

which rational men in general take of their own goods - but what exceeds ordinary is called more than ordinary care - & what is less is called less than ordinary care -

The omission of ordinary care is calld ordinary neglect - the omission of more than ordinary is less than ordinary neglect - but the omission of less than ordinary care - is more than ordinary neglect - which is calld gross neglect - Jones 11. 13. 30. 31.

The omission of that care which indolent men take of their goods - is gross neglect. Jones

Gross neglect is regard as evidence of fraud in the bailee - but not always so - 2d Ray 915 - Jones 13. 30. 64. 55 -

If the bailee suffer his own goods of a similar kind of the goods baild to be lost by the same negligence - it is not evidence of fraud however gross.

A degree of care proportioned to the nature of the Bailt - Explained &c

1 If the bailment is for the benefit of the bailor only - nothing more than good faith is required of the bailee

Where A delivers his goods to B to keep gratuitously he is liable only for fraud - when they are for A's benefit -

Jones 15-16. 31 57. 64-5

101, 102 (4 Coke 84 (b) not law)

The bailee may make himself liable in all cases by a special agre^t tho it is not common. Jones 223. 61-2. A.

2 When the bailee is only ~~is~~ benefitted by the bail^t he is liable for slight neglect — & is bound to use more than ordinary care —
Where goods are borrowed for the use of the borrower exclusively he is liable for slight neglect

3. Where the bail^t is advantageous to both the parties nothing more than ordinary care is required of the Bailee Jones B.14. 223. 32-3. 101. 105.

Different kinds of Bail^t.

Bail^t according to common law is divided into six kinds — But Jones has only five kinds —

1. A deposit — or depositum — A deposit is the delivery of goods to the bailee to be kept without recompense —
2 Ld Ray 912. Bul N P. 72 — Jones 36-7. 1 Pow Con 297 Esp Digest 618. & is for the sole benefit of the bailor —

2. Second kind is an Accommodatum — which is a gratuitous loan of goods to the bailee entirely for his benefit — which is called lending & borrowing —
2 Ld Ray 913-915 1 Pow Con 299. Bul 72 — Jones 36. 89. Esp Digest. 619.

A Mutuum differs from lending & borrowing — a mutuum is a loan for consumption — & the thing baild is not ~~to~~ specifically restored — therefore it is not a bail^t — Jones 89-90. Dr & Student 129. 1 Bac 241.
This loan is generally gratuitous —

3 Bailments of the third kind ~~are~~ is called locatio & conductio — which is in english — letting & hiring Jones. 85, 119 1 Pow Con 251. Bull N.P. 72 —

4. Bailt of the fourth kind is a delivery of goods, for the security of a debt — & is called a pawn or pledge 2 Ld Ray 913 — Jones 85, 119. Bul 72 1 Pow con 251-2 — Esp. N.P. 624

5. The fifth kind of Bailt — is a delivery of goods to be carried by the bailee for a reward. 2 Ld Ray 913. 917 — Bul 72-3. 1 Pow con 253. Under this are common carriers or private persons — 1 Pow 253.

6 — sixth kind is a delivery as in the former, & differs only in this — that the bailee does the labor gratuitously — this is called in Eng mandate — in Lat mandatum —

2 Ld Ray 913. 1 Pow Con 254-5. Bul 73. Jones 93-4. 2 Ld Ray 918.

Bailments.

I Depositum. — Under a general acceptance the bailee is liable only for gross neglect — Bull 92. 1 Pow. Con. 247. Jones B. 32. 64-7. 101-2. 2 Ld Ray 909-13.

And for this only so far as it is considered evidence of fraud — The depositary is not liable for neglect in the abstract, but only for fraud, of which gross neglect is presumptive evidence — this however may be rebutted as by the fact that he lost his own prop by the same neglect — 4 Bur 2300.

By the older opinions & even by Coke it was held that the bailee was bound to keep the goods safely at his peril — (Southcote's case) Almost every principle laid down in this case is now held not to be law — tho the decision was correct — 2 Ld Ray 655. 911. n 1913-14. J. B. 59. Stra 1099. Com. on Con 133-35. Bull N. P. 72.

It has been held that goods when left with a depositary in a locked chest — & the key withheld, the depositary is liable only for the chest 3 Atk 47.

This is denied by Ld Holt in the case of Coggs & Bernard — for he has as little power as to any benefit, when they are out of the chest as when they are in it — the fact that he has not the key makes no difference —

But his ignorance of the contents should be an important consideration in estimating his liability — for different kinds of goods require different degrees of diligence —

Even under a special acceptance he is not liable for inevitable accident — as by the act of God — or by robbery which he has not strength to resist

In a special acceptance — the intention of the parties is considered in weighing the liability. Jones B. 62-3 — 2 Ld Ray 915. Doct. & Stud.t, 130. 1 Pow. Con. 248-9. Hob. 34.

Bailments.

2. Commodatum — or lending & borrowing — the bailor is called the lender & the bailee the borrower —

In this kind of bail^t we apply the principle — that when the bailee alone is benefitted — he is liable for slight neglect — Bul N.P. 72. J.B. 91. 1 Pow Con 249. 1 Bac 244. 2 Ld Ray 916.

Thus if A lends a horse to B to go a journey — if B puts the horse in a stable not locked, & he is stolen the borrower is liable
Again — It is a general rule that the borrower is liable for theft unless he proves extraordinary care on his own part, J.B. 92. 61. no —

But a borrower is not liable for such force as he cannot resist — as by a mob — or open robbery — he is not bound to expose his life in its defence — 1 Pow Con 251. 2 Ld Ray 916.
however he may make himself liable for such a loss — if for instance he expose the prop to robbery — or if he should leave the highway & take a route which is known to be dangerous
A fortiori — he is not liable for loss occasioned by inevitable accident — although he may make himself liable even for these — As where he has been guilty of a breach of trust before a loss happens. — As if he borrows a horse to go to the North & he goes to the south —
So too if the borrower has wantonly retained the horse longer than the stipulated time — from the expiration of the term of bail^t he is looked upon as a wrong doer — 2 Ld Ray 915-17. 1 Pow Con 249. 50-53. Cro Ja 244.

Again — the borrower may make himself liable by exposing the prop by his own rashness — If for example he should place the horse in a ferry boat during a storm — & he should be lost J.B. 91. These last general rules extend to all Bail^ts

Do Bailments.

3. Locatio et Conductio. Letting & hiring — differs from the former in this particular only — that it is not gratuitous lending — but a letting for a reward — Ersk. Dig 625. —

The bailee acquires a transient prop in the thing bailed. & the bailor acquires an absolute right to the stipend for its use — In this case they are both benefitted — & of course the bailor is bound to use no more than ordinary care — & is not liable for slight neglect — the risk should be equally divided. J.B. 14. 120.

On this point there are some incorrect dictas in the Books — Ld Holt says that he is liable for the slight not neglect. 1 Pow Con 257. Bull 72.

It has been much a ques. where a chattle has been let for use, whether the bailor is bound to keep it in repair, — it is settled that he is not. 1 Sand 321. 1 Bac 331.

4. Pawn or Pledge — or a delivery of goods as security for a debt — Ld Ray 913. J.B. 30. 104. Co Lit. 208. Ersk Dig 624. 1 Bac 237 —.
: Or it may be for indemnification where no debt exists — :
It is a point decided that if A deliver goods to B. under the forms of a sale — with power given to B. to sell them at his pleasure — but reserving to A. the power to redeem them — it is considered as a pledge — In this case as in the former the bailmt is advantageous to both parties — & the bailee is therefore liable for only ordinary neglect in the event of a loss — Ld Ray 917. 1 Pow Con 272 — Salk 523 — (4 Co 83. b. & 9. a. contra) Ld Cokes reason does not support this doctrine. J.B. 105. 115. (J.B. 112. Dr & St 129. 1 Bac 240. 7 Ter Rep 392-398. 1 Stra 505. — Any bailee has a special prop in the goods bailed) A Pawnee like a hirer in general excused for losses occasioned by open robbery — J.B. 61. 107. 109. 111. Ld Ray 916-17.

Bailments.

In Southcoats case it is laid down that the pawnee is not liable for bare theft & the reason aſsigned is the same as above to shew that he is liable only for groſs neglect — viz. his having a prop. in the goods & his being bound to keep them as he keeps his own — 4 Co. 83. b) Co. Lit. 89. a) Yelv. 178. 1 Bac. 237. Com. Dig. 624.5. This cannot be law —
Jones holds unconditionally that the pawnee is liable for a loſs occasioned by theft —

In Southcoats case he says that the pawnee cannot be supposed to have used ordinary care if he permits the goods to be taken from. Jones 106. 107. 61.

But Jones clearly contradicts himself as well as the analogy of law. It is not true that ordinary care will afford protection vs a loſs by theft. & it is contrary to ~~common~~ general ~~prudence~~ experience to aſsert that men of common prudence do not suffer by theft. Jones 92. 61. 109. 116. 138. 2 Ray. 917. 18. Sal. 522. 1 Vent. 121. 1 Powel on 252.

It is a ques. of fact whether ordinary care was used or not. & this must determine the pawnee's liability — if there was ordinary care he is not liable
Ld Holt places this liability for a loſs by theft on the same footing with that of a factor, who is excused if he used reasonable & ordinary care. 2 Ld Ray. 918. Ven. 121. Sal. 522. Powel on 252 —
Indeed Jones himself says that in commodatum, the borrower is liable for loſs occasioned by theft unleſs he proves that he used ordinary care. Jones 92, 126. 138.

2d Bailments.

The pawnee like other Bailees gains a qualified prop or special interest in the thing bailed, but this interest is ~~defeasible~~ determined - as by payt on the day his interest is determined also by a proper tender which for any purpose of divesting the prop of the pawnee, is equivalent to a payt Cro Ja 244. Jones 111. Bul N.P. 72, 4 Co 83 (b). Yelv 179. 3 Sal 268, 2 Sal 522,

If then after payt & tender of payt on the day of payt - & demands the goods pledged - & the pawnee detains the goods - he is a wrong doer - & is liable for any damage Esp Dig 625 Jones 111-12 2 Ray 917 Sal 522. 4 Co 83 (b) 1 Pow Con 253.

The Pawnor may bring trover for the goods against the Pee & also ~~detinue~~ detinue Cro Ja 244. Jones 111, Sal 441, 1 Bac 237-8.

The Pawnor may also bring Asst against the Pawnee

Bul N P 72.

If the refusal to redeliver the goods on payt or tender is by the Pawnees servant or agent - the Pawnee is liable But if it was out of the servts regular course of business the Pawnee would not be liable

2 Sal 441. Jones 126. Bul N.P. 72.

In Bailt. the pawnee agrees express or implicitly to return the goods on the day of payt. — provided the debt is satisfied by tender or payt.
But the pawnor can have neither of the above actions until he has pd or tendered payt. of all that is due, both principal & interest —
A refusal to deliver up prop pawned — after payt. or tender of payt. of the sum due is an indictable offence at C. Law —
This rule is not general as to mere breaches of trust, they being considered only as civil injuries & not offences. Sal 622. 3 do 309. Con. Dig. Pawn — on this point there was a diversity of opinions but it seems now to be settled. as the rule Carth 299. 2 Haw 210. 1 Bac 241.
This is a mere rule of policy for it is clear that a breach of trust in this case is no more culpable than in another —

The object of the rule is to protect the pawnor from oppressions — the danger of which is greater in this than in almost any other species of Bailments. & the transaction is generally private, so that the pawnee is enabled to conceal the fact — & further, pawns are usually made by persons necessitous & embarrassed —

The pawnee has in some cases a right to use the pawn — This right where it exists is said to be founded on the consent of the pawnor, either express or implied. This presumed right is said to exist or not — in general — as the prop is likely to be improved or injured — or not affected at all by the use. Jones 112-13.

The stat of Conn enables the finder to recover a remuneration for his expences & trouble — Here then the finding is advantageous to both parties — & the finder is bound to use ordinary care — upon the first principle of bailt. — St of Conn 595-6.

Bailments

J.G. Thinks that the C.L. rule is the same tho' the reasoning in Cro. El. is against — that was an action of *Trover* against the finder of *Goods* — which were spoiled while in the possession of the finder — through his negligence — On demurrer it was held by the Ct. — that the action of trover would not lie — the action should have been a special actn on the case for negligence — It is well settled at C.L. that the finder has no *lien* upon the Goods for his *trouble & expense*. But on demand made by the true owner — with sufficient evidence of ownership — he is bound to deliver them. & should he refuse — he is guilty of a conversion — & is liable in *Trover* — 2 H Blac 254. 2 Bl Rep 1117. Stra 667.

But the case of *salvage* is different — for when goods are wrecked & abandoned at sea — the finder is entitled to a reward. this is a principle in *maritime* L. — 2 H Bl 258. Ld Ray 293. 5 Bac 270.

J.G. Thinks no compensation could be had at common law — The act of the finder is a mere act of courtesy — & a voluntary courtesy will not sustain an action at C.L. — Hob 106. Com Dig 89 — I do not therefore see any way of recovery —

But a refusal of the finder to deliver goods to the party claiming on demand, is necessarily a conversion — unless the party claiming them should offer evidence of ownership — 2 Bulst 312. Com Dig 580.

A. finds the goods which actually belong to B. C demands them & on A's refusal to deliver them — C brings trover for the goods. & by false testimony recovers the whole value, Now can B, the true owner bring an action vs A & recover of A again — (1 Root 445 —). it was so decided in Conn. J.G. Doubts the correctness of this decision on this ground — that where the L compels a person to pay a sum of money for a given cause or consideration — it will not compel him to pay it again 3 T.R. 126. 1 H Bl. 669. Doug 161. 2 H Bl. 408.

Bailments

If after a tender of payt by the pawnor & a refusal to deliver the goods by the pawnee – the pawnor recovers in an action of Trover – The pawnee may recover his debt notwithstanding his breach of trust, He must however, first make a demand of the money tendered – 1 Bulst 29, 31. 1 Bac 238.

If perishable goods are pawned & perish in hands of the pawnee, the pawnee does not loose his debt. Yelv 179. Sal 523. Co Lit 209. 1 Bac 238. Jit Bailt —

The pawn is not considered as a satisfaction – but only as security for the payt of the debt –

While the pawn lies unimpaired in the pawnees hands he may sue for the debt & recover, unless there was an agreement that he should rely on the pledge only – Stra 919. 9 Lev 116. Crp Dig 86. Yelv 179.

However unjust might be the conduct of the pawnee he still is entitled to his debt.

Pawnors may however recover for the loss of their goods –

If the debt for which the goods are pledged – is not payed by the day appointed for the payt – the pawn vest absolutely in the pawnee by law – & is forever gone from the pawnor – to this is the case of mortgages analogous; Co Lit 205; 3 Atk 395; 2 Vern 691. 698. 1 Bac 243.

After this the pawnor has a right of redemption – in equity

1 H B 14
1 Bac 238

When ~~there~~ there is no time agreed for the redemption of the pawn the pawnee may sell the pawn after a year & a day La Ob 2 Lib 126.

Bailments.

A factor cannot pawn the goods of his principle so as give the pawnee a lein upon them Mast & Sert 24. 1 H Bl 362.
The reason appears to be that the factor has only a lein upon them & that as a personal right which cannot be transfered. The contract producing being a fiduciary, a lein — J.G. thinks it cannot be transferred in any case & certainly not in this.

The principle is willing to trust the factor & give him a lein on the prop untill their accounts are settled, but he does not give him power to appoint a new keeper —

It is now settled that if a factor pledges the goods of his principle to secure a debt due from himself — the principle may maintain Trover after demand & without tender of the amount due the factor. —
The act of pledging it, is a breach of trust by which he forfeits his lein —

On failure of payt at the day appointed the pawnee is at liberty to sell the pledge — for the title is absolutely vested in him Co Lit. 215.
he must refund the overplus of the sale to the pawnor — L C Ob 22 vol. 126
According to some opinions he may sell or assign the pledge before the day of payt — 1 Bro 239. 1 Vez 350 1 Bulst.

But these opinions for various reasons cannot be correct.
Every Bailt implies a contract strictly fiduciary, & Buller observes that a lein is a personal trust which cannot be transferred — Ld Ellenboro expresses the same opinion & a similar doctrine is deducible plainly from the former cases. Yelv 179. Cro Ja 244. 7 East 6. 5 T R. 606.

A pawn after forfeiture ceases to be a pawn Co Lit & 12 Co 12 — Cro El 556. 2 Bro 376 Vez 359.

&c Bailments

It appears contrary to the analogy of the L. that a pledge should be assignable

It is clear that a pledge cannot be forfeited by his crimes to the King by the act of the pawnee before the day of paym^t 1 Bac 248.

But a person may thus forfeit what he is capable of conveying in his own right — Co Lit. x. 12 Co 12. Cro Char 556. 2 Bac 376-7.

It is also settled that a pledge cannot be taken in Ex^n as the Pawnee's — because the interest of the pawnee is of such a nature as to render it dangerous to the right of the pawnor to allow it to be taken, 1 Bac 238. 352. Dyer 67. (b). Owen 124.

It is laid down in Brooke's Abridg^t that a pledge cannot be "aliened" evidently meaning that it could not be assigned. 1 Bac 238. 1 Ver 359.

This is the principle which governs fiduciary acts relating to real prop or lands —
They cannot be converted or embezzled nor can the mortgagee's insolvency or knavery prevent a redemption —
But a chattel may be run away with destroyed or embezzled.

There is a case in 2 Ver 69. etc that seems to show that a pledge may before the day of paym^t —
A. pawned goods to B. who immediately after & before the day of paym^t pawned them to C. A after the day of paym^t brought a bill to redeem of C. & it was decided that A should pay the sum due from B. to C. as well as that due from himself to B.

Ext Dig Pre in Ch 419, 490

Bailments

But it is to be observed that the bill was brought after forfeiture when the equitable redemption was lost & the interest ~~[illegible]~~ of the assignee was precisely the same as it would have been, had the assignment been made after the forfeiture. 2 Vern 691. 698. (this is certain from the Bills being brot in Equity)

But the pawnor may forfeit his interest in the pledge by Treason Felony &c. But the King or public cannot take the pledge without paying the debt due from the pawnor. for the interest forfeited by the pawnor is only an equity of redemption. (this term L.) Yelv 179. 1 Bac 238. 1 Bulst 29.

According to L. G. the fair conclusion is that the pawnee cannot assign before forfeiture & if the pawnee were to assign he would be immediately subject to an action in Trover — The assignee also would be liable.

It was formerly held essential to a pawn that it should be delivered at the time when the debt accrued which it was ~~inted~~ intended to secure & that if it was delivered afterwards it was not a pledge — but a license to insure a trespass in taking, to be retained during the pawnees pleasure.

But this is not now so & it is settled that the pledge may as well be delivered afterward as at the time of contracting the debt. 1 Bac 238. 1 Berry. 350-9. Yelv 164. 2 Leon 30. Bul N.P. 35. Com Dig 576. 1 Buls 68.

It was formerly supposed that where there was no time fixed for the payt — that the pawnor could not redeem only during the joint lives of the pawnor & pawnee

But it is now held that he may redeem at any time during his own natural life — (But see London Chol 22 vol. 176. provided the pawnee does not call on him, to come & redeem. 1 Eq 224. Yel 178. (Equity)

Where a day of payt is appointed the death of either party does not forfeit the right of redemption – 1 Bac 289. 1 Bulst 29. ~~in equity~~)
If the Exr or Admr of the pawnor, pays the debt at the day of paymt the pawn absolutely rests in the Exr or Admr 1 Bulst 29. 1 Bac 289.

V. Bailment of the 5th Kind.

This delivery is the delivery of goods to be carried or to have some act done to them by the Bailee, for a reward pd to him –
This class includes a delivery to a common carrier an Innkeeper a Mechanic &c 2 Ld Ray 917-18. It includes all cases in wh hire is to be pd by the Bailor –
The two different classes of Bailees – viz common carriers & private persons – require a distinct consideration –

1st A delivery to a private person means a delivery to a private professional character – as to a Factor – Bailiff, Broker &c, or any private agent in general. 2 Ld Ray 918. Jones 128-9.
It includes beasts of pasture to any agisting farmer –
This bailmt being advantageous to both parties the Bailee is bound to use only ordinary care – & is liable only for ordinary neglect. & this is correct both on principle & authority (in the language of Ld Holt if he use reasonable care it is sufficient. 2 Ld Ray 918. 12 Mod 487. 1 Ven 121. Jones 14. 22. 32. 128-9. 131. 3-4-8. 1 Pow Con 254.
A Bailee of this class is *prima facie* excusable in the case of Robbery as the other Bailees before mentioned. Jones 129. 130-8. Co Lit 89. Holt 131. 4 Co 84(a). 2 Ld Ray 918.
In the case of mere theft the Bailee is liable or not as it appears that he used ordinary care or not. Jones 138. 1 Ven 121. 2 Ld Ray 918. 2 Lev 5. 1 Rol 4.

According to Jones if metal be delivered to a smith to be wrought into a utensil or vessel - the smith is liable - Such a delivery he maintains vest the prop absolutely in the smith as a mutuum - & if a loss happens he must at all events be liable. Jones 49. 143.

The reason is that the metal when wrought cannot be identified - 2 Bl 404. Poph 38.

This seems to be incorrect though the owner cannot identically know the prop - or metal - yet if the fact can be proved that it is the same - it can be identified in fact. & therefore specifically restored.
(If in the above case the silver be lost without the neglect of the smith, ought not the Bailor to suffer?)
The hardship of the case is another objection to the doctrine -
If the metal were destroyed even by the act of God - before any alteration made ~~th~~ he would be liable -

In the case of a mutuum - the Bailee purchases the prop delivered to return an equivalent.

It is considered by Jones a mutuum in which smith would be a purchaser -
But it is not strictly a mutuum - In that case the rule would undoubtedly hold - as where wheat was delivered to A. & is consumed or destroyed - Here A is virtually a purchaser - & is liable at all events.

The Sup Ct - of N York have rejected this rule -
When prop is delivered to a Bailee, who is to perform some act of skill upon it or about in his professional character - the L presumes a two fold act on his part - It not only implies a contract that he will redeliver it when the purpose of the bailt is answered - But that also - the act shall be performed skillfully or in a workman like manner - & also faithfully -

Bailments.

But if the act to be performed is not in the line of his profession or common avocation. the L implies no contract on his part that the work shall be skillfully done, & therefore the bailee will not be liable unless he made an express agreem^t that the work should be done skillfully – 1 H Bl. 158. Jones 128-9. 137. 40-1. 11 Co 54 a. 3 Bl. 165-6. Vaun 324. Esp D. 601. vide action on the case)

If goods of this kind are delivered to a Bailee & are lost or destroyed for want of that care which is by L required of him – he is not entitled to wages for the labor previously bestowed upon them. 3 Bur 1592 – (Ld Md opinion)

But if the prop had been lost after the labor had been bestowed & without the Bailee's fault, it would seem that he would be entitled to wages. Jones 142.

Common Carriers.

Common carriers have become so frequent now, that the Law consider them as very important –

A common carrier is one who in general makes it his business to carry the goods of another for hire – as a waggoner – a porter, a drayman &c – also a master of a ship employed in carrying freight – 2 Ray 918. 4 Co 84. Cro Ja 330. Hob 18. 1 B. Rep 27. Esp Di 619-29. Jones 150-1. 1 Ray 220.
It seems to have been formerly doubted whether any other than Land carriers were within the description of Com Car – Hob. 17, 18. Cro Ja 330. J 149-51. 12 Mod 487. Ray 220. Ven 190. 2 Ray 918.
There is now no doubt as to the liability of Com Car on water –

The masters of ships then carrying goods for another person are com car. & in case of a loss the action may be brot ag the master or the owners of the ship Esp Di 623. Sal 440. 1 T.R. 18. 78. 3 Lev 259. Carth 62.

In strictneſs the owner of the veſsel only would be liable, the master being his servt. But there are many reasons which render it just & neceſsary that the master should be liable — the freighters often know nothing of the owners —

If a common carrier having conveniencies for carrying the goods of another & having his hire tendered him, refuses to carry them he is liable to an action on the case. For by aſsumeing this public character, he impliedly holds out an offer to carry for any one applying — so that there is an implied contract to carry them. Bul N.P. 70. 3 Bl 166. Hender 163. 2 Show 327. 1 Bur 344.

But tho a com. car. is bound to recieve prop as mentioned in the last rule — yet he is at liberty to make a conditional or special acceptance The L. allows him to say that he will not be answerable for a package unleſs he is told what value it contains, & is promised that a proportionable reward shall be given him. 4 Bur 2298. Esp Di 622.

The bailt here being adventageous to both parties it would follow if there were no circumstance to impede the application of the general principle, that the com. car. would be liable for nothing leſs than ordinary neglect. this was the case as late as Hen 8th — In the reign of Eliz it was settled. — But the rule at that time extended no farther. Jon 144.

The rule now is that the com. car is liable for any loſs occasioned in any manner — except by the act of God — of Public Enimies. or the Bailor — 2 Ray 918. 3 Bur 1593. Bul N.P. 70. 1 Stra 128. 1 Cart 609. 1 T.R. 27. 1 Sal 18. 1 Wil 281. 1 Pow con. 253. Esp Di 619. 621.

It will be seen then that the liability of com. car. extends far beyond that of other Bailees when the bailt is adventageous to both, & the distinction is founded on public policy — 2 Ray 918. Jo 145. 1 T.R. 33. Esp Di. 618. — (4 Co 84(a)) Sal 143.

Of Bailments

A common car is not liable to this extent unless he is pd or is to be pd. because if he carries gratuitously he does not act as a com car but as a mandatary. Carth 485. Esp Di 621.

A common Car is in the situation of an insurer at all events. – except the act of God – public enemies, or the Bailor –
If then the goods are lost by any cause above human control he is excused. 1 T. R. 33. Stra 128.
But for loss by fire occasioned otherwise than by lightning he is liable – If it be by accident ~~or~~ an Incendiary. he is not excused. 2 H. Bl. 113. 1 T.R. 34 Esp Di 620. (fire in London 1666.)

When the goods are spoiled in consequence of a hole knawed through the ship or vessel which contained them by a rat the Bailee was holden liable – The rule is the same when running on shoals. 1 Wil 281. Bul N.P. 70. Jones 147-8.

He is liable for ~~all~~ loss occasioned by rebels – or insurgents, for they are not such public enemies as come within this rule –

Pirates are public enemies within this rule – But it has been ~~said~~ decided in Eng that a shipmaster is not to be excused for loss occasioned by fresh water pirates. i.e. Robbers in Harbours or Rivers – 1 Ven 239. 1 T. R 18. Esp Di 620. 1 Ven 190. 1 Mod 85.

If a tempest should make it necessary to throw the goods overboard, the car is excused. for tho ~~the~~ the immediate act of throwing the goods over board is not the act of God yet the necessity was occasioned by the act of God – 12 Co 63. Esp Di 620. 2 Bulst 280. 2 Roll 567. Jones 157. 1 Brow 345.
A hoy of [illegible] being thrown overboard in a tempest; the master was held liable – Probably because the hoy was light – this decision turned on the point that it was unnecessary – or it could not be Laws. J. 157. Allen 93.

Bailments.

In the case of a loss by throwing the goods overboard in a tempest owners, masters, freighters, passengers. must apportion the loss among them. – For it was for the benefit of all. 1 East 220. 2 T.R. 417. 2 Bac 594,5

This is a rule of the Lex Mercatoria. which is a branch of the Com Law. 1 East 220.
On this subject there is a stat in Conne 1 Conn Rep 428.

As to the passengers contributing in such cases – J.G. thinks Jones mistaken. Marshl. Ins 466.
If a Bailee voluntarily or unnecessarily expose the prop. he is liable. Stra 128. 1 Conn Rep. 487. Esp Di: 620.
A com car. is excused when the loss is occasioned by the act ~~of the~~ or the fault of the Bailor

Thus where A. delivers a cask of wine to B. in a state of fermentation to be carried, & the cask burst in consequence thereof, B was held not to be liable. Bul N.P. 69. 74. Esp. Di: 621.

So where the carriers waggon is full & the owner insists on the goods being carried & is willing to take the chance – it is his own fault if the goods are lost. 2 Stra 127. 1 Bac 344. This supposes the carrier to be guilty of no willful or wanton misconduct.

For the purpose of subjecting the carrier, the goods must have been lost while in his immediate possession & under his immediate care & control Esp Di 621.
If the owner sends his servt in a hoy or ship to take care of the goods – & he takes charge of them, the car. is not liable for the loss which may happen. Esp Di: 621. Bul N.P. 70. Stra 690. 2 Show 327.
The meaning of the rule is that the master is not liable as a com car – he doubtless would be liable if the goods were lost by his fault or neglect – as if the goods should be lost in consequence of the ship being unseaworthy – or misconduct of the master or mariners in the managing the ship. Esp Di: 621. Bul N.P. 70. Stra 690. 1 Bac 344. 2 Sh 327.

The amount of the rule seems to be that in such case the master is not liable for want of care in the custody of the goods as a com car but he would be as a private carrier.

But when goods are delivered to a master & a passenger is merely requested to take the oversight of them, the masters liability is not impaired 1 Rolle 2. Cro Ja 330. Holt 17.

It seems a com car is liable for a box, tho ignorant of its contents, unless he discharges himself by a qualified or special acceptance. 4 East 128. Jones 148. Stra 145. Carth 485. Bul 70. 1 Burr 45.

And according to ~~the~~ two decisions, tho the carrier is misinformed of the contents of the box by the owner, he is still liable unless he accepts it specially. In one of these cases the owner told the car that the box "contained articles of small value" when in fact it contained money, but still the carrier was holden to be liable. Allen 93. Bul 70. Vent 238. 1 Bac 345.
In the other case the owner said the box contained a book & some tobacco when it contained £100. 3 Keb 135. Dr & Stu 130. Allen 93.
Both these cases appear to be opposed to any principle of justice. The books say he may discharge himself by a special acceptance i.e. in the present case by saying "I will not take your word that the box contains only books. (etc).

Ld Mansfield has expressed his disapprobation of the Rule, & the later opinions of Ld King, Kenyon are also opposed to it. 4 Burr 2300. Com-
Stra 145. 1 East 610. Selw Jones 148.
The above decisions overrule—

To make a special acceptance it is not necessary to have any ~~direct~~ personal communication with the Bailor — but advertisement is considered sufficient — 4 Burr 494 2 Sch D: 622 Cowp 485. 5 R 531. 4 Bl 298-300. in note —
But this qualified acceptance depends upon this, whether the owner had notice of the advertisement —

Under a general acceptance the car. is liable for all he receives provided no fraud be practiced on the car —
But if he make a special accept. he is liable no further than than he accepted — — the car must be pro rata Bul 70.71.

If the car says he will not be liable at all — unless he is truly informed of the amount of money &c & the whole amount — & the goods or money are lost. he is not liable —

J. Gould's opinion is that an Advertisement by the master or owners of Steam boats — that they will not be liable at all for Baggage — that it is perfectly nugatory —

It has often been made a ques how far a master of a stage coach is liable —
A master of a stage coach who receives pay for passengers only & not for the goods is not liable as a com car. — tho if they are lost by his neglect he is liable — Cow Rep 25. 1 Bac 343.4. n. Bul N.P. 71. 2 Sch D: 622-4.
Tho a com car is not liable for more than his reward extends to yet he is liable without actual payt before hand because he may recover on his quantum meruit —
He is not bound however to receive the goods without payt
1 Bac 343. 1 Sel 302. 2 ~~Ho~~ Show 81. 129. Cro P. 262 —
(J.G. thinks that the fare extends to the Baggage as well as to the person)

To charge the car it is not necessary that the goods should be lost in transitu, for if they are lost at the Inn before the delivery he is clearly liable — & if the goods are not delivered & are lost he is liable unless he can clearly prove, that it was not the established custom to deliver them, but to deposit them in the Inn. 2 Bl Rep 916. 17. 3 Wils 429. Esp Di 623. 1 Bar 345. 5 B.R. 38. 3 Day 364. 3 Con Rep 1. 3.

When the custom is for the car not to deliver the goods ~~but~~ to the consignee, but to keep them in store for him, he is not liable as a com. car. after they are deposited in the store. 4 B.R. 581. Esp Di 623.

But if he keep them as a depositary without any pay for storage — he will be liable as such — If he keeps them for a reward for storage he will be liable as a hirer for the want of ordinary care —

Of the delivery of Goods on a dock de - side. 1 Sel 302-4.5. John 39. 11. 107. 1 Bar 345. Ow 57. St 39. 2 Bl Rep 917. 5 T. Rep 396. 2 Com Con 272 &c — If the consignee directs by what car they shall be carried he & not the consignor will be entitled to his action for he is the Bailor — 8 T Rep 330 n) Esp 570. Bul N.P. 35. 1 Pow Con 343. 353. — Cow 294.

Whenever the consignor makes himself liable for the price of conveyance & takes upon himself the risk, he is entitled to the action, even tho the consignee select the carrier. 8 T. Rep. 659. 1 Selw 313. 1 Pow. Con. 443-52. Bul 35. 2 Burr 2680. 1 T Rep 659. So when the consignor himself selects the car, he may sue.

If one sends an order for goods without nameing a car & the vendor delivers them to a com car, they are at the risk of the vendee, 8 T. Rep. 330. 1 Atk 248. 2 Camp 36. Selw 312. 12 John 282. Esp Di: N.Y. Ed. 42.

Bailments

When an action is brought vs ship owners it must be brot vs all when it is assumpsit — or the suit will abate because the right of action is ex quasi contractu Sal. 440 Esp Dig 623. — But this rule is to general — see 5. 3 Rep 649-51, & 5 Burr 5 T. Rep 651. 3 East 62, 70.

By the com law P. Masters were considered as com. car. for letters money &c entrusted to the mail —
But now they have ceased to be so considered — Ld Ray 646 Jones 153. vide master & servt 42. Ld Ray 646 —

It is indispensible to the character of a com car. that he should recieve hire of him who employs him. But the P. Master recieves payt — as an agent from government — & for its use.

A P. M. is liable to the individual injured for his own neglect — & so are his subordinate officers liable for theirs. but no farther. 3 Wil 443 Com 765: Jones 18.

The general custom of declaring vs com car. is asst — 1 Selw 314. 15: 3 East 65: — (Contra 1 Bac 343. Holt 18 1 T Rep 33. 3 Mod 227.)

When the prop is lost or stolen from the com car — without his misfeasance — the only remedy vs him is an action on the case — Trover will not lie for there is no misfeasance — but it is on the ground of neglect — but if he were guilty of an actual misfeasance — Trover would lie — Sal 655: & do 148. Holt 257. 5 Bur 2827. 5 Bur 267. Esp 594.
He may make himself liable to both these actions. Selw 315 —

A com car has a lein upon the goods. Ld Ray 752. 867. 5 Bur 269. 2 H. R. 64. Esp N. P. 199. 1 Bal 49.

Bailments

2d A delivery of Goods by an agent to an Inkeeper seems to fall under the 2d gen division of the 5th class of Bailt — Jones 130–2.
A delivery of goods in this way is a bailt to a person exercising a public employment, for a reward.
Espinasse calls it an Accommodatum — or lending gratis — (But this cannot be true) Di 625–6.
J Buller classes it under the last. i.e Mandatum.

A mandatary as such is always a Private Bailee — & he recieves the goods to take care of them gratis. But an Inn keeper is always recompensed for his care — he recieves a price for keeping them — & even for inanimate objects, he is rewarded by another gainful contract, by which he is bound to entertain his guests. The pay for a room or chamber has refference to the storeage. Bul 73. Jones 130, 2, 4.

The Bailt being in this case advantageous to both parties the Inn keeper would according to general principles, be liable for ordinary neglect only. But the policy of the L has extended his liability somewhat further —
It seems to be a prevailing opinion that an Inn Keepers is co extensive with that of a com car. But I know of no express authority to this effect — See Jones 133–4. 135 = a.c.l)

The Inn Keeper is liable for any loss that happen to the goods of his guest by his servants Esp Di 626. Jones 134-5.

So also if the goods of a guest are stolen at an Inn. by a stranger – the Inn Keeper is liable – Cro Ja 224. 8 Co 33.a 5 T Rep 276. Jones. 134.
But when the goods of the guest are stolen by the servant or companion of the guest – the Inn Keeper is not liable So if one lodge in his room by his request – Esp Di 625 Cro El 285. 3 Bac 183.

G. thinks that an Inn Keeper would be liable for a common Robbery of his guest
3 Bac 182. Jones. 135. a. b – Plowden

By the Roman Law an Inn Keeper was liable as far as a Com Car – & the Eng L & our L on this subject are derived from the Roman L – Jones 134-5 – Yelv 162 a. no –

The liability of an Inn Keeper as advanced by L. Coke is expressly denied – J. Buller – T Rep 276.

But the extent of liability of an Inn Keeper is not in the Books definitely expressed or defined –

The Inn Keeper is liable only for such goods as are "infra hospitium": but this includes his out houses & stables. 8 Co 32.a) Esp Di 626-7.
If the goods of a guest are removed from an Inn by his own direction & lost the innkeeper is not liable – As if the guest orders his ~~guest~~ horse to pasture & he is stolen the Inn Keeper is not liable – But if the Inn Keeper puts him in without the consent of the guest & he is stolen he is liable – for it is his own fault – Bul N.P. 73. 1 Rolle 4. Esp 627. 8 Co 32(b). Esp Di. 627.
But if the guest orders his horse to pasture & he is lost through the insufficiency of fence – the Inn Keeper would be liable on the ground of neglect.

Bailments

If damage is done through the Bailees neglect. ~~the~~ the Bailor may sue him on assᵗ — on the agreetˢ express or implied 3 East 62. 1 Wil. 282.

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6. Class — which is called Mandatum —
Which is a delivery of goods to be carried. or to have some act done to them without reward —

Bailᵗˢ of this kind ~~have~~ have some been very improperly called; acting by commission — Bul N.P. 73. 1 Pow Con 254. 2 Ld Ray. 918.

This kind of Bailᵗ — being for the benefit of the Bailor only — the Bailee is liable only for gross neglect
Jones 74. 2 Ld Ray 909. 1 H Bl 161-2. 1 Pow Con 255 —
See the case of Coggs & Bernard — Jones.

But when there is an express agreeᵗ by the Bailee to use more than the care required by principle — & the loss happens by the omission of that care which he agreed to use. he is clearly liable. Such an agreeᵗ to use all necessary care & skill may in some cases be implied — but under what circumstances will be considered hereafter —
An agreeᵗ then of this sort will subject the mandatary for less than gross neglect. 1 H Bl 161-2. Jones 74.
The omission of the stipulated care will be considered as gross neglect even if he does not stipulate for extraordinary care. —
(This sounds to J.G. as a very strange doctrine)
Indeed the agreeᵗ alluded to goes to confound all distinctions of care & if such doctrines be correct all the rules would be absurd. Yet this seems to be the opinion of Ld Holt. 1 H Bl. 158. 1 Pow Con 255. Jones 85. 2 Ld Ray 919.

An agreet of a mandatary to use all care & skill is not implied in this bailt unleſs the act to be done is in the line of his profeſsional busineſs -
This seems to be the true rule, But Jones says that this bailt from the nature of it implies this agreet - (but it is not suppor ted by authority. 3 Bl 165-6. 1 H Bl 158. 11 Co 54 a. 1 Saun 324. Espi 601. (Jones 84-5. 139. 16 East 78. 2 Ray 910.
For Jones distinctions between the duty of Bailee - in feasance & in keeping see Jones 73-4. 8. 79. & New Edition 61. 70-2.
This distinction is unfounded says T. G. & opposed to the doctrine in 1. H Bl 158 3. Bl 165-6.

But when there is an engagement expreſs or implied to use all due care & skill, the Bailee is liable for groſs neglect only. Jones 78. 1 Pow Con 255.
A. a Merchant engaged to enter at the custom house the goods of B. & to do it gratuitously - he did it, but made a wrong denomination of them, in consequence of which they were forfeited - A. was held not liable, because his own goods were lost on the same account, & therefore there was evidently no fraud - 1 H Bl 158. 1 Pow Con 255. 3 Bl 165-6. Jones 149-50. Esp 601.
Jones agrees that a Bailt to carry goods, does not imply a contract to use all neceſsary care & skill. Jones 72. 84. he is liable only for groſs neglect.

It has been observed that the L. implies an engagement to use all neceſsary care & skill on the part of the mandatary, when the act to be done is in the line of his profeſsional busineſs -
But this implied engagement extends only to the feasance or doing of an act & no further -
There is no implied agreet to use all care & skill in keeping it &c - for if the goods should be lost the mandatary would be liable only for groſs neglect -

Thus if a Tailor engages to make a garment gratis the Law implies an agreet to do the work skillfully – but not to keep it. 2 Ray 918. Bul 93. 1 Pow 255: Bul 73.

Even an expreſs agreet by a Mandatary to use all neceſsary care & skill will not subject him for loſses occasioned by the act of God or Public Enemies – or the act of the Bailor. 2 Ray. 916. 11. 15:

An engagement to carry safely extends only to the carrying – But it would seem that the Bailee cannot even by expreſs agreet exempt himself from loſses occasioned by his own fraud, or tort. 2 Ray 918. Bul N.P. 73. 1 Pow. Con 255: – "It is contra bonos mores" ergo vs law. Jones 66. 75:

It has been observed that according to some authorities the omiſsion of stipulated care is groſs neglect. – This was disagreed to. but whether it be true or not – on the delivery to the Bailee the engagement binds him as a contract. 2 Ray 909. 10. 19. 20.

So that after the goods are delivered to a mandatary the engagement on his part. expreſs or implied binds him as a contract – But he is not bound before delivery) –

If I promise to build a house for A. & at the time refuse to do it he cannot compel me – for it is a nudum pactum!

So if I promise to carry goods gratis for A. & at the time refuse to take them I am not liable – but after having taken them I should certainly be bound to carry them. 2 Ray 920. 5. 5 Rep 143. Cro Ja 667. Dr & St 129. 1 Pow Con 364. 12 Mod 487.

So where A delivered money to B. & B promised to deliver it over to C. B failed to deliver it over to C. & A recovered of B. in aſst (Yelv 128.) Cro Ja 667. 8. 12 Mod 489.

Jones says the liability of the Bailee is founded on his groſs neglect & not on the promise – 2 Ray 910. 19. 3 Burr 62. 5 Rep 140. –9–50. Jones 76. & 0 says that when special damages accrue on account of the partys not taking the goods according to agreet an action will lie – tho the action is gratuitous. & this he says. is because of the special damages – but he has no authority for this rule. – 75 – 80.

The damage must accrue if at all on the breach of the contract, but this would be "damnum absque injuria".

The ques. of damages cannot arise until the ques of contract has been settled.

It would be begining at the tail. for it would be useless to the partys right to damages before it was ascertained whether the action will lie. Besides the case which Jones supposes will not support damages even if the action would lie. 4 John 84.

On the other hand when the goods have been delivered special damages are not necessary to support the action— the law presumes damages where there has been a breach of contract. 2 Ray 909. 10-19-20.

It is said that the action vs a mandatary (his undertaking being gratuitous) is founded upon his neglect & not upon his promise express or implied— 3 East 62. 5 T Rep 143.

If this is the case how can an express promise extend his liability— he may certainly make himself liable as an insurer vs all risks. But if his express promise would not bind him as such, how can he become more liable for any promise, than without one. There is no foundation for this opinion, Jones cites Rolle. but it is doubtful whether he supports his position—

It seems to be the spirit of all the authorities that he is liable upon his promise— Jones 50. or 86. Contra 2 Ray 909. 19. 5 T Rep 140. 3-5. 3 East 62.

— Liens —

A lien is understood to be a distinct claim or incumbrance upon some specific prop of another as security for some debt & accompanied with possession. 1 East 4

If this definition is correct it would seem that a lien exists only in favor of Bailees of the 4th & 5th classes. & not all of the 5th.

It is true that a hirer has a right to detain the goods— but this is not a lien it is a specific prop not an incumbrance to secure a debt—

In case of a depository & mandatary there can obviously be no lein. The Bailor may countermand the delivery whenever he pleases. Esp. 583.

A Bailee of the 4th Kind always has a lein. in the case of a pawn or pledge a lein is created by the delivery. for that is the only object of the delivery. Cro. Ja. 244-5. Yelv. 178. Sal 522. Esp. Di. 583. Pre in Ch 419.

Most Bailees of the 5th Kind have also a lein. i.e a right to hold the goods entrusted to them as security for their hire or reward. But this is not the case of all the Bailees of this class. 3 Bac 185; Holt 42.

This lein is created by a condition in Law.

A person who obtains possession of the goods from the Bailee wrongfully has no claim to this lien. 5 East 585; 7 T.R. 485; Sal 654.

A com. car. has a lien until his hire is pd. 1 Ray 752. 867. 5 Bur 2816. 2 B Rep 64. (Contra 1 Ray 867. not L.)

And it is laid down by Ld Holt that if the goods are stolen & delivered to a com car. the latter may detain them as the owner until his reward for the carriage of them is pd. for as a carrier he is bound to receive them. 1 Ray 869.

An Inn Keeper may retain the person of his guest for the payt of his bill — he has a lien upon his person for he is bound to receive him. 3 Bac 185; 2 Bul 85; 1 Show 269.

He may also detain the horse of his guest until his keeping is pd for — But the horse cannot be detained for the payt of the guest's entertainment. — the owner may however be detained till both are paid. 5 Bac 269. 1 Ray 868. Bull 45; & Co 147. Sal 388. Esp. Di. 584.

And an Inn Keeper may detain the horse even tho brot. by a person not the owner, & he may detain him as vs the true owner until his keeping is pd for. it is not his business to know the true owner, & it is sufficient that the horse has been kept on his provender. Yelv 67. 3 Bac 185; Esp 584. 2 Rolle 85. 1 Show 269.

But the Inn keeper looses his lien by voluntarily permitting the horse to go out of his poſseſsion – Indeed this is the rule as regards all liens upon per. prop – Poſseſsion is eſsential to all such liens — Esp Di: 584 Strange 557.

A lien is a right to detain & necessarily refers to that already in poſseſsion. Stra 557. Esp 584. 1 Bur 493-4. 1 East 4.

Most private Bailees of the 5th claſs have also a lien. A Tailor or Merchant to whom goods are delivered to be wrought has a lien until the price for so doing is paid. It is true he is not bound to recieve the goods & his lien cannot therefore be founded on that principle. 2 Co 149(a) Hob 42. Yelv 67. It is said to exist for the promotion of trade & commerce.

If however the Tailor is in the habit of trusting the Bailor, he ought not to detain without giving him notice, for he is presumed to have done the work on the personal credit of the Bailor. 2 Co 147.(a) 1 Bac 240(n). Hob. 42. Yelv 67.

On the other hand an agisting farmer cannot detain the prop committed to him until pd. –

The reason is – 1. He is not bound to recieve them – 2 The interest of trade & commerce is not affected by it. Esp 585: Bul 45: Cro. Cha 197. 1 Bac 240 n)

The Captn of a ship has no lien upon her for wages. for he is deemed to trust to the personal credit of the owners. If he had a lien he might a very improper use of it. to the great injury of the owners.

For instance he might keep her in a foreign country to enforce his lien until she became useleſs – Sal 33. Doug 97. 2 Ray 632. 576. 12 Mod 440. Abbot on shipping. 141. 460.

The mariners however have a lien upon her. for they are supposed to contract upon the credit of the ship & there is no danger to the ship to be apprehended from them for tho they may libel the ship – the master has generally the power to pay them off – He is the per to whom they are to look for payt Abb 459. Stra 937. Doug 101.

Bailments

In all cases where there is a special or express agreet on which the Bailee relies for his reward he has no lien –

It has been decided in the case of a farrier who claimed a right to detain a horse until pd. for his care, that an express promise on the part of the owner to pay a certain sum for the care ousted the right to detain. Because it was said that the Farrier relied on the express agreet & it comes within the maxim "Expressum facit cessare tacitum" Yelv 66. 3 Bac 271. 2 Rolle 92. Esp 585. 6 – "This I always doubted – 1 Bos N.P. 1071. N.Y. Ed. 2 Marshall 345. 349. Yelv 66 (nn) –

A factor has a lien upon the goods in his possession. Amb 357. 3 T Rep 119. 2 Bl Rep   Esp 100. 6. 8.
& he may hold the goods as a lien on any debt account before as well as the last specific debt account

This rule holds as as to Commercial Agents generally – & for particular rules on this subject see Master & Servt

With regard to the other Bailees besides those of the 4th & 5th Classes, tho they have a special interest some higher some lower, yet none of them have a lien. there is nothing to be secured for they are entitled to nothing. 1 Roll R 128. 1 Bac 240. Yelv 172.

If one man bail the prop another it is said that the Bailee must deliver the prop to the Bailor according to the terms of the contract. Because it is said that the Bailee cannot know of the ownership, & should perform his contract. 1 Bac 337. 1 Rolle 606. 7. 1 Bac 242.

The amount of the rule is that if A bails the goods of B. to J.S. – J.S. is obliged to deliver the goods back to A. But it seems unaccountable that he should be liable to the Bailor if he deliver the goods to the true owner – And the rule appears to mean that the Bailee would be justified in delivering the goods back to the Bailor –
The rule should then be expressed that he *may* instead of he *must*. 1 Rolle 607. 1 Bac 242. Fitzh 137.

That the rule appears to be such is from a rule given afterwards *viz* that if the Bailee redelivers the goods to the Bailor before or pending an action ag the Bailee by the owner such delivery will bar the action.

It is evident from this that he will be justified in the delivery to the Bailor, & not that he *must deliver* to him.

This explanation seems to be justified by the rule that if a thief give goods to a com car. the latter is not bound to deliver them till his reward is pd.- but he must give them up to the true owner on tender of his *hire*-

If then a public Bailee must give up to the true owner, a private one *a fortiori* must also. 2 Ld Ray 869. 1 Bac 227. 1 Rolle 607. Esp Di 599.

It seems in such cases that if the bailee dies & his executor comes into possession of the goods, he must deliver to the true owner at his peril - he cannot discharge himself by a delivery to the Bailor who is not the true owner.

The reason given is that the executor having come into possession by act of Law, is bound to deliver them to him who is by L entitled to the possession - The executor not being bound to the personal trust of the testator.

This reason is very technical & I very much doubt whether he would not be justified - if he delivered them to the Bailee. 1 Rolle 607. 609. 1 Bac 237.

In pursuing the subject how far the rights of strangers are affected it is necessary to consider the rights of the Bailees creditors who seize upon the prop. supposing it to be his. & of purchasers who purchase under the same circumstances -

The L on this is in a great measure regulated by the stat 21 Ja 1. which is in affirmance of the com Law

By this stat it is provided that if when a person becomes a bankrupt he has in his possession, order & disposition, the goods of another with consent of the owner. these goods are liable to be taken for his debts, & may be levied upon by any of the Bailees Creditors. 1 Atk 166. 1 Vez 348. Doug 383. 7 T Rep 228. 8 do 82. Esp N.P. 5 T Rep 82.

This provision of the stat is founded on the apprehension of false credit with the Bailee -

It is thought more reasonable that the Bailor who has enabled the Bailee to occasion the loss, should suffer than those who trusted to the credit which the conduct of the Bailor created. 2 T Rep 70.

The stat however relates only to the case of Bankrupts Bailees - with regard to solvent Bailees there is no need of any provision for if they have goods of their own. Justice does not require that the Bailors prop should be liable

It extends to all cases where the goods are in any manner in the possession, order, or disposition of the Bailee with the owners consent; so that it extends to goods which did not originally belong to him, as well as to them which did. Esp 569.

It is well to observe that as to goods originally belonging to the Bailee & by him sold, but permitted by the buyer to remain in his possession - The rule was as strong before the stat as it is now; such a conveyance would have been fraudulent & consequently void by the stat 13 Eliz. 3 Co 81. Cowp 233. 3 T Rep 587. 95.

And also the creditors of the Bailee are allowed to seize the goods in his possession not strictly on the ground of fraud between the Bailor & Bailee, but on the ground of false credit. Esp 566. Ves 372.

Important. And further the rebutting of a presumption of fraud between the ~~parties~~ Bailor & Bailee will avail nothing to the Bailor as between him & the creditor. 1 Ves 165. 1 Atk 180-3. 2 T Rep 95.

The ques is whether there has been a false credit raised by the Bailor - if there has he is liable -

But the stat does not extend to goods possessed by the bankrupts in the right of another -

As if an Exr should become a bankrupt - being in the possession of the prop of the deceased, that prop is not liable. It is not the fault of the representatives that he hold the goods, for he holds them by law & they cannot prevent it. 1 Salk 192, 202. 1 Atk 158. 3 P Wms 187 in note. 5 T Rep 618. So in the case of a guardian -

Mortgaged goods are subjected if they remain in the hands of the mortgagor, because the mortgagee might have taken possession — The stat however does not ~~extends~~ extend to mortgaged lands as to absolute sales when the mortgagor remains in possession 1 Ves 348 Ex. D. 566. 1 Bl 189.

The reason is that the L. does not hold the possession of lands as proof of ownership & the ownership of land can always be proved by Title Deeds but there can be no such proof of personal prop

Possession of personal prop. specially with the order & disposition of it is the best presumption of Title, 1 Atk 165. 1 Ves 348. 1 Wil 260. 1 Bl 489. 2 26. 190. Rob 449. 457. Ex. D. 566.

The stat does not extend to a sale of a ship at ~~[illegible]~~ sea by an owner on land, for immediate possession cannot be given to the vendee & therefore it is not the fault of either party, that the prop remains in the possession of the vendor. 1 Atk 168. Rob 549-51. 2 T Rep 462. 1 Ves 361. L.-C. Ex 526-8. 2 T R 485-491. 4 Mall & Sel 240.
But the vendee must take possession in a reasonable time after the ship returns into port —

And in certain other cases an actual immediate delivery is not necessary to take the case out of the stat —
As if A sell goods to B & they remain in his storehouse — A delivering the key to B — they are considered as in the possession of B. & on A's becoming a bankrupt these goods cannot be held liable for A's debts — but the ownership must be apparent.
Cow 233. Ex. D. 567-91. 3 T Rep 316.

1 Ves 252

Bailments

If A let a horse to B. to go a journey – & while B is in possession becomes a Bankrupt – the horse is not liable for the bankrupts debts – for the possession of the horse is not a sufficient evidence of ownership. 1 Atk 185. 3 SR 516. And even in the case of goods sold & left in the hands of the Bailor – As for example. If A buy goods of B. & it becomes necessary to leave them in the hands of B. – now if B becomes bankrupt while the the goods remain – the goods cannot be taken for B's debts –

If from the nature of his business the presumption of his ownership is excluded, the true owner shall ~~have~~ own the goods in preference to the creditors. Thus if a Factor known to be such, becomes a Bankrupt the goods of his principle are not liable for his debts his being known to be a factor – The possession of the goods gives no false credit to him. 1 P Wms 318. 3 Ves 185. Esp 570.

These two stats were intended for the benefit of the Bailees creditors – & with purchasers have no concern – The stat 28 Eliz has made provision for them – but as it is affirmance of the Com. L. it is needless to treat of it –

In common cases of Bailt. not coming within either stat. – the gen rule is that the true owner may recover of the purchaser of the Bailee – or a subsequent Bailee or creditor who takes the goods as being the Bailees – except in the single case of a sale in a market overt by the Bailee – For to all persons "caveat emptor" applies – 3 Atk 44. Sal 283. Esp 59. 5 Bur 260-6. 2 T.R. 376. 4 do 44.

The rule is the same as to the Bailor – as if the prop. was taken from him wrongfully –

But there is an exception to this rule when the prop. bailed is money — or Bank bills or any circulating medium. transferable by delivery — bills of exchange so transferred — hence a bona fide recovery will hold vs the owner. So in the rule if money be taken wrongfully & can be identified This rule is founded on commercial policy. Sal 126. 1 Bur 452-8. 1 B C R 485: Esh 39. 5&C. 579.

Under the stat a cred of the Bailee who seizes the prop as his cannot hold it vs the Bailor — in any case unless the Bailee is a bankrupt — in com insolvent. So it is in com law strong were the appearance of owner ship may be or have been — unless the Bailee is insolvent the creditors cannot hold the goods of the Bailor.

It has been observed that if the Bailee is insolvent his credr will not the prop bailed unless the Bailees possession was such as gave him a false credit, & it may be added that the prop must be in his order & disposition

As where A deposited a pledge with a pawn broker — a sealed bag of jewels & he being insolvent disposed of them to a third persons the Bailor was allowed to recover them against the third persons
The Pawnbroker had no right by the terms of the Bailt to treat the goods as his own — The breaking of the seals was clearly a violation of his trust. Cooke's Bankt L. 234-43. 1 T 185: 1 Cr 244. Davy 306. 7 T Rep 69. 237. Rol Ab. 553.
If goods are kept with a depositary & he becomes insolvent & sells them the purchaser cannot hold vs the Bailor. 3 Atk 44.
So also if goods are left by the purchaser in the temporary possession of the vendor — for a particular & reasonable purpose the vendor becoming a Bankt — the goods are not liable — Brown vs Punderson — Comm —

Bailments

It has been determined in Com. that if one person lets a cow to another. if the Bailee becomes insolvent. the creditors or purchasers cannot hold vs the Bailor. For it being a very customary thing). the possession is not sufficient proof of ownership. And a rule of policy supports this. for otherwise this species of Bailt. would be discouraged, & it is a very useful one

A purchaser of Beef cattle for the state of N York committed them to a certain drover to drive them to N York. & the driver brought them to his own home & sold them — It was held that the purchaser could not hold them. because the fact of driving them is a very slight. or no proof at all of the ownership.

It seems to be a ques not entirely settled in the Books whether if goods are bailed for hire to be used by the Bailee for a certain time. The creditors upon his becoming bankrupt can take the use of them for the time of bailment. The better opinion seems to be that the purchaser cannot hold & that it
7. T Rep cannot be taken in eqy. P. G. thinks not clearly — 2 Bac 352
11-12 Com. D. Eqy. E. 4. 1 Mod 210. Sal 404. 6 Mod 223. 2 Ray 795. 913.
The principle on which this is founded is that it is a personal trust in the Bailee & he cannot himself assign it during the term —
The general principle relating to the assignment of a lease applies equally well here. 5 T R 604. 7 East 67. 1 Bac 203. 1 Mod 210. 7 T Rep 11. 12. 6 Mod 223. 7.

Actions of Bailees. Bailors vs strangers & between themselves.

It is a gen rule that the Bailor having the gen prop may maintain Trespass. Trover or any proper action vs any person who takes away or injures the goods of the Bailee. 1 Bac 164. 260. 3 Run. E. L. 292. 2 Buls 268.

And the rule will hold even tho the Bailor never had possession actually – provided he had the right of possession which is a constructive possession –

Thus if A makes a bill of sale to B of goods, & B leaves them in the possession of A & a stranger takes them away. B may recover them of the stranger. for the bill of sale gives him the prop.

It is a rule of L. that who has an interest in things personal has of course the constructive possession unless it has been transferr'd by his own act or the act of L. – tho the goods may be in the hands of another – Latch 214. 2 Rolle 569. 1 Sid 438.

But if goods are pawned or bailed to be used a certain time by the Bailee, the Bailor cannot maintain an action ag. a wrong doer for taking or injuring them during that time. For to maintain Trover or Trespass the Plff. must have the actual or constructive possession at the time when the injury was done – But here he has neither. 7 T.R. 9. 1 do 480. 8 John 432. 4 T.Rep 489. Esp. Di. 383. 586.

What then is the remedy of the Bailor? I answer – that after the term of the Bailt. has expired he may bring this action ag. the wrong doer –

If he could have brot it during the term he must have had a right of possession & having that would also have a right of recaption during the term, which would be inconsistent with the rights of the Bailee – As to an action on the case, vide 1 Ch Pl 154. 2 Phil Ev 133-4. 8 John 432. 11 John 385. 3 Ch 329. n –

During the term the Bailee has the right of action – but for the detainer after the term – the Bailor has the right of action.

If the prop. be actually destroyed by the wrong doer during the term the Bailee may sue the wrong doer to satisfy the Bailor. but if he should refuse to sue or lend his name to the Bailor in order that he may sue a Ct. of Chancery will compel him to lend it –

Bailments.

If goods belonging to D. are in the possession of A. & D. gives them to B. by parol without delivery & a stranger takes them away or injures them while in A's possession. B cannot have an action vs the wrong doer - He has neither actual nor constructive possession, for a parol gift without possession does not carry a right of possession - 2 Sha 955. 5 Bac 146. Esp. 577.

But a delivery to the donees servt or any appointed to receive them by the donees order or direction is in L. a delivery to himself. Cowp 294-6. Esp. D. 14.

If the Bailee delivers over the goods to a stranger - for receiving the goods the Bailor cannot maintain Trespass vs the stranger - nor in the first instance Trover - but on demand by the Bailor & refusal, the Bailor have Trover vs him. 5 Bac 164. 261. 1 Rolle 607. L. Ray 867. Fitz 137.

On the other hand most Bailees & it would seem any Bailee may maintain an action for the value vs any wrong doer who takes the goods from him or injures them while in his possession - As to Bailees of all classes except the first there is no doubt in any of the books respecting his right. 5 Bac 165: 262. Bull N.P. 33. L. Ray 276. Sal 141. 1 Mod 31. Esp. D. 577. There is no doubt now but all may -

The remainder of the actions on this title will be considered under the title - Trover - Trespass -

Inns & Innkeepers —

At com L any one might establish an Inn. unless they were so numerous that by establishing others it would make a public nuisance of them. 3 Bac 178-9. 1 Rolle 84. Cro. J. 599. When they become nuisances they are subject to an indictment—

And any one by assuming the character would become liable for the duties at C.L— 468. Cro Ja 599. 2 Hale 194.

The subject of Innkeepers examined some other time —

Sheriffs & Jailors &c

The word sheriff denotes the Governor or Keeper of the shire or county. being derived from the saxon word shire & reeve - 1 Bl 339. 4 Bac Ab 430.

The mode of appointing shff in Eng & here differs materially. & there is also a difference made in different states-

But in this he is appointed by the Legislature for the term of three years. in Eng he is appointed by the King - 1 Bl 340-1. He is an annual officer that he may hold the office during the pleasure of the King. but they are appointed annually in Eng -

The shff must abide in the county for which he is appointed. because he is a county officer only & has no regular jurisdiction out of his own county. 4 Bac 435.

But when it is necessary to go out of his own county for the purpose of completing some official act beginning in his own county - in this case he may have authority to go out of his county - As if the shff of the county of A is commanded to deliver a prisoner in the county of B. to the court - he has authority to carry him to B. ~~Here~~ every official act is deemed an entire act - & the completion has reference to the inception. 4 Bac 435.

Again if the prisoner of the shff escapes from him into another county the shff may pursue & retake him in another county. tho he could not have gone out of his own county to make the original arrest - Plow 17. this is only in furtherance of the act begining in his own County - Bac Ab Shff - f -

His authority may in some cases extend beyond the duration of his office - when it is necessary that it should - as when an official act is begun - to complete it.

And he must complete the act begun, for the execution of legal process is an entire indivisable act - & in this case it makes no difference whether his authority expires by its own limitation or, whether he is turned out of office

Sheriffs & Gailors.

On this subject a case of greate celebrity arose in   which was certainly decided as law in the election between Clinton & Jay — Salk 320. Cro Ja 73. 1 Rolle 493.4.

The same rule holds as to Constables within the limits of their particular jurisdiction, ie their authority extends beyond the duration of their office for the same purpose —

The sheff may at C.L. appoint Deputies or under Shffs who are his substitutes, & they have authority to execute all ordinary ministerial business of the office. Holt 13. Kirby 340. 4 Bac 437. Bac Ab Shff — h-1.

By a stat of this state, the shff may appoint the sheriff of another county his Deputy. then the shff of the other county may act as deputy in one county & as Shff in the other —

The deputy is of course removeable by the shff at his pleasure i.e. he may revoke the authority he has given him, & this right is absolute & unqualified — But while the Deputy remains in office his general powers cannot be abridged by the shff — For while he continues in office he is bound by authority paramount to that of the shff to execute all business in the line of his duty. Holt 13. 4 Bac 437. Stat of Conn — Salk 95

Shffs in some cases have attempted to bind their deputies not to execute any process above a certain amount. for the purpose of retaining the more lucrative business in their own hands — every such agreet is utterly void — For a deputy may not by any contract bind himself not to execute any of the official duties

In Eng & where the com L regulates the duties of shffs the deputy acts officially only in the name of the shff & never appears as acting in his own name in any act appertaining to his office. For he is not at com L — a known public officer but as a mere servt of one —

Therefore in Eng no writ is ever directed to a Deputy as such — ~~writs~~ writs in gen are directed to the shff of the Co — & the deputy in executing it does it in the name of the sheriff — Salk 96. Cowp 65 — Bac Ab Shff — h. 1.

And this is the meaning of the rule laid down in the books, that an undersheriff cannot return a writ i.e. he cannot return a writ in his own name. Cowp 65;

But under a stat law of this State a deputy may & most frequently does act in his own name, for our stat makes him a public officer, & writs may be directed to him & usually are so. Usual form in Conn. "To the Shff or his deputy or constable of such town" & when directed to him there is no impropriety in his returning it in his own name. Still notwithstanding this provision a writ directed to the shff only may be executed by the deputies whether gen or special. Kirby 237. For tho regarded as a pub offr he is also considered under our stat as a substitute of the shff. A deputy, however cannot delegate his authority to another person i.e. cannot create a sub deputy. For it is a principle of common & constitutional Law, that a representative must act in his own person & never by proxy. Eg member in the house of commons in Eng cannot vote by proxy. But a Peer of the realm may. the one is the other is not a representative of the people. But tho a deputy cannot delegate his authority, he may lawfully command the assistance of any third person to assist him in the execution of his official duties, & such third person will be justified in giving the assistance demanded. For he may empower another person as an assistant to act in his presence or company. Here is no assignment of authority. the assistant in the case supposed is a mere instrument "pro re nata." If the Shff directs a warrant to two persons either of them may make the arrest & execute the warrant. For the authority being of a public nature is several. 3 Bac Ab Shff L 4. Co Lit. 181. Strange 119.

But if a private authority is conferred upon ~~two~~ two individuals without any express provision that they may act severally — they must act jointly or not at all —

Sheriffs & Jailors

If a deputy is guilty of any neglect of duty (as in the case of an escape) the shff may have an action on the case vs him — For by this act of his the shff is himself made liable to the party injured & there is also an implied contract on the part of the deputy that he will perform faithfully the duties of his office — 1 Roll 98. 4 Bac 442.

As however it is usual for the shff to take a bond from the deputy for his faithful performance &c. the most usual remedy for the shff is an action on the bond — He may bring this action immediately on the breach of duty — even before action brot vs the Shff — ~~Rolle~~ 98.

The shff is ex officio the Keeper of the com Jail — by the com Jail is meant the Jail required by the com L in each county. And the Jailor is a servant of the shff. i.e. the jailor of the com jail & he is a sort of under shff appointed & removable at the shff's pleasure 4 Coke 34. Gil. 119. Rules respecting the liability of shff for official neglect of his deputies apply also Jailors. Bac Ab Shff h 4.

And the shff has regularly no right to confine his prisoners in any other than his own jail, unless he is authorised by express statute provision to confine them in some other place. It follows that if the shff confine his prisoners in any other place when not authorised so to do by stat he is liable for false imprisonment. Holt 202. Latch Re ~~[illegible]~~ Salk 408. Bac Ab Shff h. 4.

For he is not confined according to Law — In this state with the exception of New Gate there is but one jail in each county —

When a shff in Ct. confines a prisoner in the penitentiary, he does it authority of some express stat. —

It follows from the fact that the Shff is Keeper of the com jail in his county that a shff cannot be imprisoned on any civil process in his own county. If therefore a shff is so arrested the arrest is void — For he being Keeper of the jail cannot of course be imprisoned in it.

(Quere, as to the rule in [illegible])

Sheriffs & Gailors.

This does not prevent a shff from being arrested in another county if he happens to be in such other county.

It was decided that if a shff is arrested on a civil process the writ must abate. Ch. J. thinks this rule wrong. For a copy is sufficient to hold him to trial — (Kirby 48)

If a shff is arrested on criminal process he may be committed to the prison in another county, ex necessitate rei, tho taken in his own county. this appears to be the rule of the com L. tho there is no definite rule on the subject in the Books. Latch 16. 1 Mod 198.

It has been determined in the state of N.Y. on a ca. sa. by a coroner (who is the proper officer to arrest him) the coroner must imprison him in his own house i.e. coroners house — This rule seems very questionable. 6 John 22 —

This rule was adopted as analogous to the case of a shff who makes an arrest when there is no jail in the county in which case has an authority to constitute his own house a prison —

But a coroner has by the com law no authority to make a jail where there is none. Latch 16. The Judges treated it as a new case & thought it justified by the necessity of the case

But tho the shff cannot by the com L. be imprisoned in his own county, he may be arrested, but he is entitled to be discharged on com bail. but this com bail answers to hold him to trial; so that judgment may be obtained vs him as well as if he were not shff. 6 Johns 34. He may then at C.L. be arrested on mesne process & held to nominal bail. the consequence of which is that he may be holden to trial —

We have no such thing as com bail, so that it would seem he should not be arrested, but the process should be read to him which will answer the purpose of holding him to trial —

Sheriffs & Gailors

The Shffs liability for his Deputy—

The deputy being the servt of the shff he is liable in many cases for his neglect

He is liable on the principle that the act of the deputy is the act of shff — & for this reason the shff is allowed to take security from all his deputies for their faithful performance — 4 Bac 141. Hiles 18.
The shff is only liable civiliter for the acts of his deputy, he cannot be liable criminaliter — unless he was instrumental of the act—

If the Dep suffer a voluntary escape the shff is liable in a civil action — 1 Rolle 94. Cro El 175. 1 Leon 146. 4 Bac 442. So also is the Dep liable

Where a dep levied an exr vs A. on the goods of B— B bt an action vs the Shff— & the shff was held liable — Dougl 42. 3 Bl — (contra Bac Ab Shff h.4.) In this case the shff is liable in trespass. 2 Kelly 352 Dougl 42— 2 Bl.
The shff & all his dep are considered but one officer. 2 Bl Kelly

For the mere neglect of duty the shff only is liable to the party injured— ~~the~~
Cowp 403-6. Esp Di 603. Salk 18. 5 Coke 89. Bac Ab Shff. h(4)

But for the private torts of the dep i.e. torts unconnected with his official duties the shff is not liable. Cro El 175: 1 Leon 146. 1 Rolle 94.
But for positive torts or misfeasance committed by the Dep in his official acts bothe he & the shff are liable to the person injured—

But for the defaults or acts of a special Dep appd by the Pltfs request & upon his nomination the sheriff is never liable for it is the act of the Pltf - & he must bear the consequence (4 T Rep 120. Esp Di 607.)

In this state however the Dep is liable for his neglect as well as positive torts - because he is made a public officer

This personal liability of the Dep in Conn does not however exempt the shff from his liability - & both or either of them are liable at the election of the party injured - (these rules apply to Jailors) 8 Coke 92. Cro El 366. 4 Bac 445: in the escape of prisoners see 1 Mod 14. 4 Bac 445.

On the death of shff the authority of the Deps & Jailors cease -

General Authority & Duties of a Sheriff &c

By the Eng law the shff is a judicial as well as an executive & ministerial officer. he holds Cts within his own Bailiwick. hears & determine causes &c - 1 Bl 343. 4 Bac 448-9.

But in this state his authority is only executive & ministerial & not judicial -

He is in this state regarded only as a ministerial officer & conservator of the peace; in this latter character he is properly an executive officer -

What is the difference?

A ministerial off is one who executes the law in obedience to the commands of some superior officer. as the shff in executing a writ acts in obedience to the mandate of the court -

Sheriffs & Jailors.

An executive officer is one who executes the law without any commands from any superior authority, & without any obedience to any other person, but only in obedience to the law itself. 1 Bl 343. 1 Rol 237.

At C. L. he may without warrant as an executive officer apprehend & commit to prison all who break the peace or attempt it

He is bound to apprehend all traitors & commit them to prison. And he is bound ex off. as conservator of the peace of his Co. to defend it from public enemies—

1 Bl 343. Co Litt 168. 4 Bac 430.-53.

And for these sole purposes he has authority when necessary to command the asst of the posse commitatus. or power of the County— By the posse commitatus is meant in Eng all male persons above 15— except peers of the Realm. He is in this state empowered by stat to do these acts (in genl which he is authorised to do by the Com L.) & he may command the asst of all within the limits of his county of age & ability—

By our law the Constables of their respective towns have the same power & may command the power of the town—

As a ministerial off he is bound to execute all legal processes properly directed to him. & on his refusal or neglect to execute such process he is liable at com law to fine & imprisonment. & a civil action by the party injured— Plow 77. 1 Bl 344. Dyer 60. 4 Bac 449.

He is liable by our law for not returning a writ whether executed or not.

Rule in Eng Doug 446. 2 H Bl 233. 3 Bl. 291. Esp. Di. 616
The poss commitatus are obliged to assist if required—
(Title Shffs Stat of Conn)

A shff or other officer may not break the outer door or window of the Defts dwelling house to arrest him or to seize his goods on any civil process whatever— because evy mans house is considered his castle & on the principle that it might be exposed to thieves & Robbers— !!! 5 Coke 91.

This rule has its origin in the feudal customs when every mans house was in reality his castle. 5 Co 91b. Cow 1. Cro El 909 Hob 62. Com Di: 604. Kirby 383.

It was held however, that when the arrest was made - or the goods seized by breaking the outer or inner door of the deft's dwelling house in a civil suit, that the arrest was valid, & the only consequence was that the shff was liable for trespass. 5 Co 92. B. 5 Mass 155: this is not law -

But the modern rule is to discharge the deftt in a summary motion - when so arrested - & this supposes the execution of the process to be void -

The power of the Ct to discharge on motion is discretionary & if the deft has been guilty of any dishonourable conduct the Ct would not I trust discharge him - Cowp 1. 2 Bl Rep 825. Bac 364. 4 ib 524 n.

If the party cannot obtain a discharge in this way, he must resort to a habeas corpus, which is strictissimi juris & cannot be denied him -

What is legally necessary to constitute a Breaking?

Now in the L of Burglary the lifting of a latch or raising a window when there is no obstruction constitutes a breaking - But I presume there must be some violence which would make a breach ~~of the peace~~ - in the case of a shff -

This privilege of castle is however construed most rigidly & it is now settled that this privilege extends only to the outer door - & if he once gains admission peaceably - he may break down any inner door or other obstruction when necessary in order to reach the party or the goods concealed, but he may not do this wantonly - he must first desire admission & must not break unless refused. Cow 6 & 7. Hob 62. 263. Com Di: 604: 5. Comb 17. 327. Cow 4. When the shff may break in see 5 Co 93b. 4 Bac 435. Hob 62.

Cts of Justice in modern times have considered such privileges with disapprobation. Cow 7.

In criminal process this privilege is not allowed, but the shff may not do this even in this case wantonly & unnecessarily he must first make known his business & require admission (5 Co 91, 4 Bac 434)

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On a process then to compel the deft to find sureties for the peace, after demand of admission & refusal, the shff may break down any obstructions to obtain admission, for this is strictly a criminal process. 1 Co 131. 4 Bac 454.

The rule is the same on a process of forcible entry & detainer; where one with high hand expels B from his mansion house, he cannot evade the process by shutting himself up in the house.

If one having committed a felony flees into his own house & is pursued either with or without a warrant, & either by a shff or private person, his house may be broken open if necessary in order to take him. 2 Haw 139. 4 Bac 455

But if on the trial felony is not proved to have been committed the person thus acting with or without warrant is liable in an action of trespass—

on a civil process a barn or outhouse not joining the dwelling house may be broken open to arrest the person or seize his goods— but in the Law of Burglary this is different— 1 Rol 698. 4 Bac 455.

The rule is settled to be the same as regards a store not adjoining the dwelling house

If a Shffs Bailiff attending the shff lawfully enters a mansion house the shff may forcibly enter to rescue the bailiff. & being in may arrest the owner or attach his goods Cro Ja 555. Palm 52. 4 Bac 456.

And if a person once arrested on a civil process escapes into his house. the shff may then if necessary break his house to retake him. & this is the rule with regard to all escapes. for the right of custody has once attached -- for the privilege of castle extends only to the original process- Pal 54. 4 Bac 456. 1 Rolle R 138.

If a person is illegally arrested by the breaking of his outer door- or window of his dwelling house. & is afterwards charged while in custody with another process. the arrest under the second is good. unless there was collusion of fraud in making the first arrest- 2 Bl R 823. Esp Di: 605.

By the stat 29th Car 2 & we have a similar one here) no civil process may be executed on sunday. & if such an arrest is made it is void. & the party arrested is entitled to a discharge on motion. The officer in such cases is liable for false imprisonment- Salk 78. 4 Bac 456. 656.

There has however been much dispute in this state, how great a proportion of the 24 hours should be considered as constituting the sabbath-

But it is now settled that sunday) includes only the daylight of the first day of the week. 3 Conn Rep 541- (Did not intend to settle any theological question as to holy time) (now 24 hours -)

But the stat rule forbidding arrests, extends only to original arrests. but if a prisoner once arrested escapes on Sunday. he may be retaken on that day. tho the stat makes no express provision for that case- yet it arises from the construction put upon the statute- 5 BR. 25: Salk 626. 6 Mod 95: 253. 2 L Ray 1028.

For this recaption is only a means of continuing the officers prior custody. The off has the same right to retake a prisoner as he has to resist his escape. & he may undoubtedly do this on Sunday-

Sheriffs & Jailors.

In case of an illegal arrest made on Sunday. The Ct will discharge the prisoner on motion. 6 Mod 95 – if the Ct should refuse to discharge him he may have a habeas corpus. –

Escapes.

An escape is an unlawful evasion of lawful restraint, or custody, so that a person's going at large can never amount to an escape unless the restraint is lawful. 3 Bac 233. tit Escapes –
Where therefore a person being under lawful arrest & restrained in his liberty – evades that restraint violently or privately, or, is suffered to go at large, before delivered by a due course of Law: it is deemed an escape. & the off is guilty of an escape

An escape is always a wrong & the party escaping is always guilty of a wrong; either civil or public according to the nature of the process on which he is arrested – as if the process is a civil one the escape is a civil wrong; if it is criminal the escape is a public wrong –

It is essential then to an escape in law that there be a previous arrest & legal – Esp. Di: 607. 8-9. Cow 65: the evasion of illegal arrest is no escape – the doctrine of escapes necessarily includes the law of arrests

An arrest to be lawful must of course be made in pursuance of some lawful authority – There may be some cases where an arrest would be lawful tho not made in pursuance of a writ or warrant. 4 Bac 455: – & tit false Impt.)

It is no objection to the legality of the writ that the process ~~was~~ is erroneous – for it is not the business of the Shff to judge whether the action can be supported or not – 5 Co 64. Stra 507. Esp. Di: 353. 391. 657.

This rule supposes that the process was regular & that the mode of making the arrest was lawful – for no process whether lawful or not will justify an unlawful manner of executing the writ – this rule then goes no farther than to the give of authority –

If the Ct issuing the writ has no jurisdiction of the subject matter or if the process is void as being irregular — the arrest under it is also void. So that in this case there can be no escape — for the offr has no right to detain him — Esp D: 608-9. By subject matter is meant the cause of action —

In this state it appears that the defect of jurisdiction in the Ct issuing the process must appear on the face of the process — or the shff will be justified in making the arrest —

If a lawful arrest is made on mesne process, the Defts going at large is no escape — provided the deft appears in Ct on the day appointed. This is the Eng rule — 3 Bla 290.

Under our law the rule is still more liberal for here if a lawful arrest is made on mesne process — the defts going at large is no escape — provided he be forthcoming before the return day of the exn which may be obtained vs him in the suit

If a criminal action is brot in the Ct of Com Pleas it is void because it has no jurisn

Tho the Ct has complete jurisdiction of the subject matter the process may still be void as irregular —

If a writ is made returnable to any other term of the Ct — than to the first term of that Ct to which by law it can be returned — the process is irregular & the arrest made on it is illegal — tho the Ct had jurisdiction of the subject matter —

The process is utterly void — not voidable — it is irregular not merely erroneous — 3 Wils 341. Salk 273. Esp Di 328-9. 608-9. Carth 148. Cro E 148.

Why is the process void & not merely voidable. ?

If a Ct can issue lawful process returnable at the second term — when it might be returned at the first, there cannot of course be any limit to the rule —

A void or irregular process is a nullity from the beginning.

Sheriffs & Jailors

Erroneous or voidable proceſses are good until & unleſs it is avoided in due course of law. an arrest made under an erroneous proceſs is justifiable in a shff—
In this state, mesne proceſses do not usually iſsue from the Ct to which they are returnable— but they iſsued by a single magistrate, therefore the general rule of the C.L. will not apply in our practice
But the rule as to mesne proceſs in Conn. should be thus expreſsed: if the proceſs is iſsued by competent authority & made returnable to a Ct having jurisdiction of the subject matter, that proceſs (aſsuming it to be lawful) is lawful & an arrest under it is valid—
But if the proceſs is iſsued by incompetent authority or returnable to a Ct not having jurisdiction of the subject matter, the proceſs is unlawful & so is the arrest—

(At com L. an off having made an arrest on final proceſs cannot delegate to a stranger his right of custody)— but this delivery of the custody) of the prisoner is an escape in L. & the party) detaining him is guilty of false imprisonment & so is the shff—

The technical reason of this rule is that the prisoner in the hands of a third person is not regarded as in the custody of the Law— i.e. not in the custody of lawful authority, for the shff cannot delegate his authority).

It is very common in this state for an off after making an arrest to commit his prisoner into the hands of third persons. It is a matter of doubt what a Ct would do if an officer sued for false impt in such a case—
The second requisit ~~in~~ to an arrest in Law is it must be an actual arrest, bare words then will ~~amount~~ never amount to an arrest—

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To make an arrest there must be an actual touching of the person who is arrested - or what is tantamount to a touching of his person - as if the off says I arrest you & requires the Deft to follow him - the submission of the deft is tantamount to a touching of his person - Esp Di 604. Salk 76. 586.
So that there must be an actual touching or what is tantamount - a power of taking immediate possession of the body & the partys submission thereto. 2 Bac 236.

If one is arrested at the suit of A & while in custody under As writ - a writ in Bs favor is delivered into the hands of the off - in this case the deft by the construction of the Law is immediately in custody on both writs without the formality of touching the person of the deft on the 2d writ. 5 Co 89. Salk 237. 2 Bac Escape P. 236. If he goes at large before discharged by due course of law - the shff is liable for an escape in both suits.

Query, as to the rule above - as to our practice

The 3d thing requisite to an arrest is that it must be regularly i.e. legally made & if not there can be no escape. Thus in all civil cases the arrest must by a writ or warrant. Cow 6th. Esp Di: 604. 2 Bac 236. a verbal authority is not sufficient
The arrest to be regular must be made by the authority of the off. to whom the process is directed - this rule requires no more than that the persons to whom it is directed make the arrest in person. or by being in company with a follower or assistant, who make the arrest. Cow 6th Esp Di: 604. 6 Mod 211.

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An arrest made on sunday in a civil suit is not regular, of course if the shff in this case permits the prisoner to go at large. it does not amount to an escape in the off. 6 Mod 95.
The case is the same where an original arrest is made unlawful by breaking the outer door or window of deft's dwelling house. Cow 9. Sal 78. Esp Di: 605. 2 Bac Ab

If an off with a ~~arrest~~ process for arrest has an opportunity to arrest the deft & neglects to do it & in consequence of this neglect the deft evades the process. the off is liable to an action on the case for neglect of duty ~~& suffering~~ but not for an escape. 3 Mod 23-4. 10 id 257-5. 2 Ray 331. 1 Day 128. Bac Ab Escape A.

The officer exercising a gen authority is not bound to show his process before the arrest — even if the deft should demand it. Bac Ab 9 Coke 69. Esp Di: 604. & 9 Rep 149.
But a special deputy must if required show his process before making the arrest — & if he refuses, the deft may resist him in the arrest — Bac Ab Shff N. 1. 9 Co 69.

Escapes are of two kinds — Voluntary & Negligent — 3 Co 52. 3 Bl 415:
A voluntary escape is one which takes place with the consent of the off arresting —

A negligent escape is one which happens without the consent of the Shff & ag. his will — 3 Bl 415.
Any person committed to prison must be kept safe — therefore if after commitment the off permits the pris to go at large for one moment he is liable —
By close custody is not necessarily meant custody within the walls of the prison. but a party is deemed to be in custody so long as he remains within the limits of prison — when on civil process) —

Voluntary Escapes -

If a Shff admits to bail a pris^{r} not bailable by L. he is guilty of a voluntary escape. or if he consents to the prisoners going at large without the limits of the prison for one moment. tho he be attended by a keeper - it is an escape 3 Co 44. 1 Rolle 806. Plow 36. 2 Bac 237

When a person has been actually committed this rule holds whatever may be the nature of the process - mesne or final - And if the person is merely arrested on ex^{n} or final process tho not committed the rule is the same. 2 BR 176. Bo Buller 26.

Prisoners arrested on crim prosecution are to be confined within the walls of the prison. but those who are committed on civil process may upon procuring security to save the Shff harmless be admitted to the limits of the yard, at the discretion of the Shff - 2 S.R. 131. (Bac Ab. Esc B 2 - 3.) these last authorities not law) But H.P. 72. 1 Root 72 Kirby 137. Habeas Corpus see last authorities - & vide 3 Keb 315 Bac Ab Escape. B. 2 Ray. 6 Mod 78 - Cro Car 14

If an Off makes an arrest on final process he must commit his pris to his jail or prison within what is called a reasonable time or he is guilty of a voluntary escape. 1 Bos. & P. 24. 2 T Rep 176. For commitment or custody is meant as a coercive means of obtaining satisfaction -
A Shff has no right to discharge a pris committed on ex^{n} by a pay^{t} to himself of the contents of the ex^{n} - & if he does he is guilty of a voluntary escape - for neither the Shff or Jailer is the pltffs attorney in collecting the ex^{n} after commitment. (This J.G. supposes would not hold in Conn - for the same ex^{n} issues vs the body & prop of the def^{t}) Cro El 404. 1 Mod 494. Sid 225. 330. 2 Bac 248. 14 East 168. 2 Ray 399. 12 Mod 214. -

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If the Pltf in the exn receive & accepts the money thus pd before action brot for an escape, he cannot afterwards sue the shff —

If a shff marries a woman committed to prison, he is ipso facto guilty of a voluntary escape, because he is once bound to discharge her &c — Plow 17. 2 Bac 239. Escape B.3.
If a shff appoints one of his prisoners turnkey of his prison he ipso facto renounces the custody of his prisoner & is guilty of a voluntary escape quoad that prisoner — Esp. 608.
(If a pris leaving the limits of yard escape it is a negligent escape) vide 2 H R 131.)

By the com L. the shff is not bound to admit a prisoner to the limits of the yard in any case whatever — but he may do it on civil process — but he may revoke this liberty at will —
But by a stat law of our state the shff is bound to allow this indulgence whenever sufficient security is given or tendered to him, provided the prisoner is committed on civil process — County Cts have authority in this state to order into close confinement a person committed on civil proc. unless the process issued from the Sup Ct. & in this case the Supr Ct has the same power —

Negligent Escape.

Negligent escapes are such as happen without the privity or consent of the officer — If then a person lawfully arrested evades his restraint by fleeing from the off. or by the use of violence the escape is negligent. Indeed an escape by any means whatever without the consent of the off. is a negligent escape — as an escape by rescue. 3 Bl 416. Cro Ja 419.

When an action for escape is brot vs an off his endorsement on the writ as non est &c is sufficient evidence that the writ was delivered to him. Cow. 63–65.
There is a very material diffce between an escape on a ~~civil &~~ mesne & a final process. 2 B. Rep. 172. 3 Bl. 415. Esp. Di. 605.–6–
If a shff having made an arrest on final process permits the prisoner to go at large on security that he will surrender himself on a given day – the shff ~~ex~~ ipso facto is guilty of a voluntary escape – & the security given is illegal & void – & if the prisr is afterwards surrendered on the security) & the shff commits him he is guilty of false imprisnt –

For after the shff has been guilty of a voluntary escape he has no right to make another arrest on same process. 2 B. R. 172 –
It has however long been decided that such a bond given by the deft as security is good. 2 Roll 133. but this is an old opinion & might not now be considered as law –
But at Com Law a person arrested on mesne process & not committed to prison may be allowed to go at large without subjecting the off. if he is forthcoming to sustain judgment or on the return day of the writ – & in this State if he be forthcoming before the return day of the exon which may be recovered vs him. Kirby 434. 2 Bl. Rep. 1049. 2 B. Rep. 172. 5 id. 37. 2 Wils. 295. Kirby 205. 382. Salk 408.
But if he is not thus forthcoming the off is immediately liable to an action on the case – as for a negt escape – but he is not liable before the expiration of that time – so that the ques whether an escape or not depends upon some event subsequent to his enlargement – 5 Bac. Escape D. 240. Cro. El. 623. 652. & 68. 2 Wils 294. Esp. Di. 609.
But if he is once committed to prison & then allowing him to go at large the off is guilty of an escape 1 Rolle 809. Esp. Di. 610. Salk 271.
We have however a stat in this state requiring the off to take bail even after commitment on mesne process –

When the pltff proceeds to judgt. vs the deft in the process thus enlarged. this does not amount to a waiver of his right of action vs the shff for the escape. for the shff has done a wrong & the pltf is supposed to have recieved an injury. 2 Wils 294.

There is by stat Law a similar provision in Eng 23 Hen 6c —
If one arrested on mesne process escapes without the fault of the shff the shff has a remedy vs him in an action on the case & the pltffs remedy vs the shff is trespass on the case. 2 Bac 245. But in this case the damages to be recovered vs the shff are presumptive, & the pltff cannot recover unless he proves a legal claim or right to recover vs the party escaping. & the escape being a mesne process the damages are not ascertained. 2 Wils 295. 2 B Rep 129. 4 do 611. 5 ib 40-1. Esp R 169. Pea Cas 65. E.L.D. 609.
The pltf can in no case recover more of the shff than he could of the deft in the process. 1 John R. 215. — the acknowledgements of the ~~debt~~ liability of the party escaping good evidence vs the shff 1 Esp R 169. Peak R 65. 8 D Rep 436.
As by the fault of the shff. the pltf has lost his opportunity to take advantage of his acknowledgment vs the party escaping he ought therefore to be allowed the advantage of it vs the shff.
For an escape on final process the pltf has his election of two remedies vs the shff viz. an action on the case. or by the stat Westr. 2 & 1 Rich. 2d. & he has an action of debt vs the shff — for by an escape on final process. the liquidated debt ie the judgt transferred from the party escaping to the shff — These statutes are prima facie the Law of this Country & is of course binding where there is no stat Law to the contrary. 2 H Bl 111.-13. 2 B R 129. 132. Esp D 213.
These two stats. extend as well to escapes on final process before commitment, as afterwards. If then on arrest upon final process the deft escapes before commitment the pltf under these ~~circumstances~~ statutes still has his action of debt vs. the shff —

But there is a difference in the two actions – if the pltfs action is case he sues for presumptive damages, & the jury may give what damages they please not exceeding however the pltfs demand vs the original Deft. – In debt the jury must give the whole amount. 2 BR 129. Esp. ii. 609. Bac. Ab. Escape F. 1 Bl R 1048.

It follows from the rule last mentioned that the party escaping is a competent witness vs the shff in this action on the case. because a judgt. vs the shff does not discharge the Deft or party escaping of his debt

It is said that if the Pltf recovers the full amount of damages ~~to~~ vs the shff – he cannot recover of the escaper –

I conceive that if the jury should assess the whole damages vs the shff he could still recover vs the escaper. This is presupposed by admitting the escaper as a witness vs the Shff – further I take the reason to be this. the action vs the original deft. is not for the same cause as that vs the shff – & the rule of damages in the two cases is altogether different. 3 BR 481. Peake's R 124. Peake's Ev 192. 3 Esp R 248. 1 Day 22. 7 J Rep 129.

But if the pltf in the original suit brings debt vs the shff in virtue of these ancient stat. the jury must give the whole sum in damages vs the shff i.e. the whole amount of debt & costs in the first exon. & if they do not a new trial may be obtained. 2 B Rep 126. 129. 132. 2 Bl R 1048. Esp ii. 609.

And this recovery of debt vs the shff is a bar to an action vs the original debtor for where the cause of action is the same in both cases. in short when the pltf recovers vs the shff he recovers the original debt transferred from the original Deft to the shff

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Our books say that where the shff arrests on final process he ought to have sufficient force with him, or that he is supposed to have time to raise the posse comitatus.—

But after a prisoner is arrested on mesne process & is committed it is no excuse for the shff tho he is rescued, unless made by the Kings Enemies. For he is supposed always to have sufficient force to guard his prison — rescue by insurgents traitors &c is no Excuse. 1 Rol 808. 1684 Esp 610.

The rule is the same when the arrest is on final process, whether the pris is committed or not (id).

But the original Plff may maintain his action vs the rescuers whether the arrest was on mesne or final process Cro Ja 486 Cro Car 109. Hob 180.

And if he once commences his action vs the rescuers he waives his right of action vs the shff that is on mesne process—

I take this to be a just rule. for if the pltf elects to sue the rescuers he thereby induces the shff to believe that he does not intend to resort to him. so that he will not take the precaution to secure himself Esp Di 657–9. 610. 6 Mod 211. Cro Cha 77. or 109.

for the form of action see 8 Holt 180. Cro Ja 486. damages Esp Di 657. 659. 611. Bull NP. 69.

In an action for rescue on mesne process the shff return of rescue is sufficient evi: of the fact. Cro El 986 Rent 224. 2 id 195. Comb 295

Difference in consequences of an escape which is voluntary— from a negligent Escape—

It was formerly held that in case of a voluntary escape, that the party escaping was absolutely & forever discharged. & the whole liability devolved upon the Shff— This rule seems intended to force the party to take his remedy vs the Shff. Hob 202. 2 Bro E. 305. This however is not now law—

It is now well settled at this day – that if the escape was on final process – the pltf may have a new action of debt vs the party escaping at Com L – or by a scire facias he may obtain a new exon vs the party escaping. Holt 61. 2 Mod 136. Vent 269. Bul N.P. 69.
Indeed it is said that the pltf may retake the party on the original exon notwithstanding the indorsement upon it. B N.P. 69. Esp Di 611

By the Eng stat 9. 10, Wm 3. the pltf in the exon may obtain a new exon on the original judgt without a scire facias. so the pltf at this day has his election of a number of remedies
3 Bl 415: 2 Bac 241.
Tho' on a voluntary escape where the commitment was on mesne process the pltf may retake the party escaping on an ~~[illegible]~~ escape warrant –
3 Co 52. 2 Wils 295: Esp Di 611.
But the off permitting the escape can never retake the party or have any indemnity vs him, as he is particeps in the crime 3 Co 52
2 T R 176. 3 Bl 415; 3 Co 52
Tho' if the off should afterwards retake he is guilty of false imprisonment in detaining him. Vent 269. 2 T R 176. Bac Es. E.
And a bond given to save the shff harmless vs the conseqt of a voluntary escape is void; as vs law – for the object of it is to encourage an unlawful act. 1 Pawlon 196. 7. 10 Co 100. W 2 Bulst 213.
But the pltf in the process may retake the party escaping even tho' he has recovered the same vs the jailor or shff – Provided says Esp the sum recovered vs the shff &c is less than the original demand vs the Deft in the process –
(This qualification I think is incorrect & calculated to mislead. vide ante) B N P. 69. Esp Di 611. –
Premise that the pltf may always retake & recover of the escaper – except where the debt is recovered of the shff in an action of debt. under the stat Westm 2. & Ric 2.
In a negligent escape the shff or off from whom the Deft escaped may have a recovery in an action on the case vs the party escaping by way of indemnity – or may retake him for he is not in fault. Cro El 238. 3 Co 52. B. Esp Di 612–13. 1 Vin 45–6.

And if the shff has taken a bond that the party arrested shall remain a true pris— he may recover on that bond for a negligent escape 1 Root 151.

But the Shffs Bailiff cannot at com law recover of the party escaping when he has made an arrest even tho he has been subjected by the Shff — for the bailiff is a mere private undertaker & is not at law liable to the pltf in the process or to the shff — And whenever he is liable to the shff it is by virtue of some bond or security given for his faithful performance. Cro Ja 349. Esp Di 613. 1 BC 245.

A bailiff is a person authorised by the shff to make an arrest within the limits of his hundred.

When a bailiff has contracted to indemnify a shff of any escape & a negligent escape is made from the bailiff. he is then in the situation of one who he has voluntarily contracted to indemnify one from the wrong of a third person — And he can never recover of the third person for whose wrong he is subjected—

It has been decided in this State that a party escaping may be retaken on an escape warrant in a neighbouring State — the process in this case must of course be mesne — for an escape warrant issues in such cases only)—

But the principle of this rule is the personal lien which the shff has acquired in the party escaping. 1 Root 124.

If a person on a criminal process escapes he is punishable by fine & imprist as for a misdemeanor & if he breaks prison he is guilty of felony — this is undoubtedly the rule of the com law — but is never put in practice. 4 Bl 129.–30. 2 Haw 122.

An off who after arresting a felon suffers a negligent escape of a felon, is punishable by fine &c—

But the shff is not punishable as accessory to the felony & can never be punished till the principle felon has been convicted & thereby — as his conviction is the only legal evidence of the fact — But before conviction of the princt felon the shff may be pund as for a misdemeanor at com law. in having permitted one arrested on crim process to escape 4 Bl 130.

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Where for a negligent escape the shff has been compelled to pay the debt due from the escaper he may recover in indebitatus ass^t vs the party escaping — for so much money pd, laid out & expended for his use & the same rule has been held where the jailor or deputy were guilty of a voluntary escape the shff may have this action. E. L. Di: 612.
It is now held that if the deputy &c suffers a voluntary escape & the shff is compelled to pay he can maintain no action vs the party escaping. E. L. Di. 612. Peak Ca 146.
If the shff retake the escaper before action brt vs the shff it will discharge the pltffs claim — 1 Root 106. E. L. Di. 611. Stra 904. 3 Co 44. 52. 2 T R 126. Kent 211-17. But if an action be brt before recaption a subsequent recaption will not discharge the shff — Cro El 657. Stra 873. Cro Jac 656-7. 3 Co 44. 52. E. L. Di. 611. So will a voluntary return discharge the shff 2 T R 126. Com R 559. 1 B & P 413.
But in the case of a voluntary escape recaption before action brt is no discharge of the shff — this follows from the rule that the shff has no right to obtain the escaper. 3 Co 52, 3. E. L. Di. 611-12.

In case of a voluntary escape — a voluntary return of the escaper will not avail the shff 2 Wils 294. Salk 271. E. L. Di. 612.

If after a negligent escape the pltff in the process discharges the escaper the jailor cannot retake the pris^r for his fees — tho if there had been no escape the jailor might have retained him till his fees were pd — for the jailor is deemed guilty of neglect, & this occasions a forfeiture of his claims to fees. Stra 905. E. L. Di. 609-11.
All the rules laid down apply as well as to escapes from the jail yard as from the walls — 1 Root 164.
Yet where one escapes from the limits the shff may recover nominal damages on the bond of indemnification — tho the party has been retaken — or returns into custody before any action brt vs the shff — for the condition of the bond is broken. 1 Root 127.

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Where there is such an escape the sh'ff holding a bond of indemnity is not obliged to receive the prisr voluntarily returning into custody, tho he may do it if he chuses — for from the moment of the escape the bondsman becomes liable 1 Root 128. 131.

Under a count for a voluntary escape the pltf may give in evide a negligent escape & this will support his declaration. So on the other hand on a count for a voluntary escape the Deft may plead any defence that would be good in a negligent escape & without denying that the escape was voluntary — Cent 211. 2 3 R 126. 2 Bac 248.

Both sh'ff & deputy are liable for a voluntary escape by the deputy — Hence if the party injured by the escape brings his action vs the deputy the sh'ff will be discharged — this is a mere dictum but it appears rational on principle — Str 612.

If after action brot vs the sh'ff on final process for an escape & before final plea pleaded the original judgt is reversed vs the party escaping, the sh'ff may defeat the action vs himself by pleading nul tiel record to the origl judgt — for the record being destroyed by the reversal of course there is no judgt or cause of action vs the sh'ff 2 Bac 246. 248.

But after judgt & exn have gone vs the sh'ff — such reversal will avail him nothing. 8 Co 142. B. Holt 209. 3 Mod 355. The sh'ff in this case doubtless would have relief by writ of audita querela. 8 Co 142. 6. Bac Ab. Aud. Quer.

A voluntary escape occasions a forfeite of the office by him who suffers it — Secus for a negligent escape — Salk 272 3 Lev 288. 2 ib 81. 3 Mod 146. 2 Bac 240.

By the com l it is the duty of the sh'ff to furnish a suffict jail for his county & if a prisoner escapes from it thro its insufficy the sh'ff is liable 8 Co 84 a. 1 Rolle 808. Str 412. 2 Esp Di 614.

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In this state it is the duty of the county & not of the shff to erect & keep in repair the jail of the county. So here the county & not the shff should be liable for an escape through the insufficiency of the prison. 1 Root 450.

In this state only nominal damages are given by the County to a person suffering from an escape through the insufficiency of the jail – Kirb 318. 1 Root 155. 158. 275. 357. 450. 505. 2 Root 30.

This mode of meeting the claim is plainly but an evasion of the law – & does in effect tend to exempt the County in all cases –
(Kirb 314. 1 Root 155. 274. 357 – 485 – 505 – 2 Root 30.)

Miscellaneous Rules.

If a shff makes a false return he is liable to an action on the case, to the party injured. 1 Wils 336. Esp Di: 615.

If the shff makes a false return as, non est inventus – & nulla bona when he might have found one or the other – he is liable Esp Di: 615. Sha 650. Cro El 729.

Here if a shff makes a false return the deft may falsify that return on a plea in abatement & then have his action vs the shff. Now by com L a return cannot be falsified by plea in abatement & only by a special action brot for the express purpose – vide Swt Pled.

If a shff volly discharges from custody a debtor taken on exn whether committed or not the Creditor cannot afterwards take the deft on the judgt or exn – they are both discharged by the discharge of the deft 4 Burr 2482. Sha 653. & 3 K 123. 7 Mo 42. Cib 525. 1 Ld 557. Chit: Bills 182.

The reason given is that the body when taken on exn is for the time being considered as a complete satisfaction of the debt

Further if the credr in the exn discharges the deft — on a new bond or promise to pay the judgt debt. the rule is the same — ie. the judgt & exn are discharged — debt will not lie on it.

But the credr may sue him on the new promise or bond — & this is his only remedy —

And if the new security thus entered into should be defeated for want of requisites. the rule is the same — & the pltf has then no remedy for his debt. 1 S R 557. ib. 525.

And if the pltf in exn discharges the deft taken in exn upon the defts giving a bond that he will surrender himself in exn on a given day — this bond is void — & the Deft is discharged — For the bond is that the deft shall be falsely imprisoned — 2 Cart 243. 1 Bos & P 242.

Our Cts have decided that this bond would be good — doubtful whether it would now be considered as law. 2 Root 103.

If two joint debtors are taken in exn a release of one of them by the pltf is a release of both. 2 Ray 690. Sal 574. Cro Car 557.

It was formerly held that if a sole deft imprisoned on exn died in prison that the whole judgt debt was discharged. Holt 82. Cro Eliz 850. Cro Ja 136. 143.

But it is expressly declared & enacted ~~that~~ by the stat 21. Ja 1. that the pltf ~~in~~ exn may sue out another exn on the death of the debtor in prison on the goods & effects of the decd debtor as if he had not been taken in exn 2 Bac 354. Kirb 183.

If one of two joint debtors should die in prison. it was held before this stat, that the other was not discharged, & this was undoubtedly in the spirit of the statte This stat is declaratory not remedial — 5 Co 86 a. Cro El 850. Cro Ja 136. 140. Chit Bills 82 —

J. G — thinks that the defts death in prison or taken on exn cannot effect the debt — the debt is not discharged — & this whether they are sole or joint defts —

Bonds of Ease & Favor

There is a class of bonds called bonds of ease & favor taken of pris. by Sheffs & Jailors. Which are declared by the stat 23 Hen 6. to be void & of no effect. 12 Mod 683. 2 Wils 351. 10 Co 100. Plow 68. A.6.

If a pris. gives a penal bond to a Sheff conditioned that he will remain a true prisoner - till the debt - fees & board is pd. is void in toto.

This stat which is an ancient one & prima facie law here contemplates only penal bonds & the object of it is to guard vs the exactions of Sheff & Jailors while the prisoner is in their custody) - tho if the bond had been for the debt it would doubtless have been good - 12 Mod 683. Holt 14. Pow Con 173. 12 Mod 683. Holt 14. 2 Wils 351.

At com law all prisoners are to maintain themselves when committed on civil or criminal process while in custody - with the exception of felons attainted for they are not supposed to have the means of supporting themselves - as their estate on conviction is forfeited to the King - 12 Mod 683. Vid 132. Plow 68.

By our stat law a person committed to prison for any offence shall bear his own charges & expenses of commitment if able & his estate is subject to these charges.

The charges in the first instance are pd by the state or town as the nature of the crime may be & the state or town has then a remedy vs the estate of the prisoner for a reimbursement - Stat of Conn Tit. Jails -

As to maintainance of persons committed on civil process the com law has made no provision - prisoner must support himself)

When a person is committed on any civil process he has sometimes the right to the poor debtors oath. the amount of which oath is that has no estate of the value of [illegible] $17. nor sufficient to pay the sum for which he is imprisoned - & when he is permitted to take this oath & does take it he will be discharged unless the creditor will pay his board &c. 1 Root 117.

But he is not of course admitted to this oath; the creditor must be summoned to appear on a given day to show cause why the oath should not be administered, & if the magistrate believes that the prisoner is not entitled to the oath he need not administer it. both the pltff & Deft may appeal from the decision of one magistrate to that of two — 5 Conn R 202.

By a stat of ours when one County is destitute of a jail the prisoner may be committed to a jail in another County. tho. he be liable to commitment for any Cause —

The prisoner must swear that he has not conveyed away his prop in order to take the oath

Account.

This action is founded on an express or implied contt that one who has recd the prop of another to acct for shall account. – if one has recd the prop. of another & refuses to account – this action lies vs him, & if he has unaccounted he is liable for the balance in Indeb. Assumpt. At com L – this action could be maintained only vs guardians in socage &c Com Di Acct A– & bailiffs & receivers. 1 Bac 16. 2 Roll Ab 119. 161. Wats 229. This action lies between joint merchts – for they are receivers for each other – (Id). Watson 48.

By the stat 4th Ann this ~~stat~~ action is extended, so that it lies in favor of one joint tenant &c 1 Bac 17 Co Lit 172 (a).
At C.L. the ~~actn~~ of acct was not only confined to guardians in socage but was confined to the original parties – & ~~does~~ did not extend to their representatives. Com Di – B. D. Co Lit 89. 90. Fitz 117.

But to that C L rule an exception always was in favor of the exrs of joint merchts tho not vs them – Co Lit 91. B. 2 Insti 404 Com Di B.

By stat Westm 2. 25 Edw 3. This action was extended to exrs & in the cases of guardians, bailiffs & receivers – & to actns of exrs & admrs Co Lit 89. B.
By the stat 4 Ann it was extended vs exrs & admrs &c 1 Bac 17. 3 Bl 164.
Our stat extends the action to jt tents tents in com. & co parceners – & their exrs & admrs &c

Account.

In any case except that of guardian – the Deft is charged as bailiff & receiver – Com. D. A.3. Fitz 116.

A bailiff is an agent or servt who has recd the prop. of another to improve or make profit of – & account – & is entitled to a reasonable compensation for his expenses – Co Lit 172 (a).

a bailiff must not only acct for profits which he has made, but for all he might have made by the use of reasonable industry – Co Lit 172 (a) Com D. A.3 2 Vent 184 (a).

A receiver – is one who has received money for the use of ano~~o~~ther – merely to render an acct for it & has no allowance for his trouble – 1 Roll 119. Co Lit –

Eg A receives money due on bond to B. to acct for ~~them~~ it.

a genl receiver having no allowance is not bound to acct for profits – for it is not the duty of a receiver to employ the money to make profit.

one exceptn – viz the case of jt of merchts Co Lit 172 (a) 1 Bac 19.21. Com Di E10.13.

Although a genl receiver has no allowance it is not to be understood, to deprive the parties from making an agreemt for an allowance – & he will still be a receiver notwithstanding such an agreemt

A bailiff cant be charged as a receiver – because he would in that be deprived of his wages –
C L 172. 1 Roll 119. 1 Bac 19.

Account.

As this is an action sounding in acc^t merely, it does not lie in the case of tort. Com D. D. 8-9.
2 Excep^ns – one in the case of the King in Eng & the other in the case of inf^ts Co Lit 172(a). 9 C. B. 11 Co 39(a). 1 Ver 430. 1 Atk 485. 2 Ver 255–342. Com D. A 2. Fitz 118. Cro El 229.

If there are three or more partners in trade – acc^t does not lie at L – it does not lie to adjust their acc^ts – the remedy in such case is by bill in ~~Equity~~ Equity. 2 B&P. 269. 2 Day 442 – 2 Com R 425.

It is said that an act^n of acc^t does not lie for a sum certain. 1 Bac 19. 2 Brow 76 Com D. A 3.
This rule in the gen^l terms is not well founded. but for a sum certain ~~that~~ one can^t be charged as bailiff.
act^n of acc^t will lie v a shff for a sum collected on exec^n Co Lit 172(a) 1 Bac 20.1. 2 Mod 101. Com D A 4. Fitz 116-18 1 Roll 120.122.

If money has been rec^d ~~by~~ of A to the use of B. acc^t lies for B. here the plff must declare of whom the money was rec^d Co Lit 172(a) 1 Roll 120. Fitz 118 Com D. A 4. & title Receivers.
If a mere bailee of goods wastes or refuses to deliver them acc^t will not lie – but the action should be trover or detinue – or assump^t on the cont^t Bailm^t 1 Com D. D. 1 Bac 19. 1 Roll 120.
So also an action of acc^t does not lie v a disseisor – for the profits he has rec^d Com D. D.
If a bailiff makes a deputy – A can^t maintain acc^t v the deputy – tho the bailiff may – because as between A & the deputy there is no privity Com D D 4. 1 Roll 118-20. Fitz 116.

Account

If an inft be made baliff - acct cant be maintaind vs him - because he cant acct. Com. Dig. Acct. B. 1 Bac 9. 1 Roo. 117. Keil 118. Co Lit 172(a)

If one who receives the prop. of another to acct & makes an express promise to acct - acct will lie - or ~~express~~ special assumpt. - 1 Bac 10. Salk 9. Carth 89. Com Di. 964. Kirby 164.

But L. Holt says if action be brot on the special agreemt the pltf shall not ~~investigate~~ investigate the items - Com D. 94. Salk 9. Carth 89. (Quaere 1 Bac 10.)

- But he so. does an ~~acct~~ recovery in special assumpt bar an acct ~~to~~ acct.? It seems that acct might ~~be~~ afterwards be brot

If one person by deed acknowledges that he has recd prop to acct - the pltf may bring acct. or an action on the deed - as a deed. 1 Bac 9. 1 Roll 8. Dyer 21. Cro El 644. 1 Bac C. 219-23. 225 - 1 Ld R 499.

If one person finds the prop. of another acct does not lie vs him - because there is no privity of dealings between the parties. Com D. Acct B.

Mode of proceeding in the action of Acct

In this action if the pltf prevail, there is two judgts - 1. that the Deft do acct & then auditors are appointed - & before them Deft accts 1 Bac 21. 1 Mod 42. Com D. E 15

After the hearing by the auditors they make their award - & then final judgt is rendered upon it by the Ct. 3 Bl 169. 11 Co 40(a) Com Di. E 15

On the first issue the point to be settled is whether the Deft is obliged to acct.

On the second issue before the auditors. the Deft is to acct. & it is to be ascertained what is due the pltff (& in Conn to the Deft) In a Conn the parties may testify. & by our stat. may be required to testify & on refusal may be imprisoned by the auditors till he will answer

If the Deft refuses either to attend before the auditors or to produce his acct. the auditors must award in favor of the pltf. – Com Di. C. 15 – Co Li 386 – 3 Wils 117.

If the auditors find a balance in favor of the Deft, they may, in Conn award for him – not otherwise in Eng at law – a balance for Deft there is recovered in Chy – 1 Bac 15.

Pleadings on the part of the Deft.

There has been some contradiction, in the Eng Books as to what the Deft may plead in bar to an action of acct.

Pleadings by Deft.

It is competent for the Deft to plead to the action of acct any thing which goes to shew that he is not bound to acct.

It is good plea to an action of acct. that the Deft was never bailiff – or receiver – 1 Com Di C. 4. 1 Bac 20. 1 Roll 121.

A release of all actions is good plea in bar – 1 Roll 123. 4 Bac 85. 1 Bac 20.

An award of arbitrators that the Deft should be acquitted of all actions – is a good bar – Cro El 82. 4 Bac 85.

A plea that the Deft received the money as bailee & that he has delivered it is a good plea in bar to an action of acct. Com Di Acct E. 5 – 1 Roll 110. 118–122. 126–7. 130. Cro 22 836 3 Mod 114–5.

These foregoing rules go to shew that the Deft ought not to acct at all – & that he is not liable to acct & then pleas must be made to the Ct & not to the auditors.

A plea that the Deft has made payt or satisfaction of the money due – is not a good plea in bar – but these facts may be proved before the auditors & are good accounting – 1 Bac 20. 1 Roll 123. Dyer 22. 145 – 4 Bac 85. 1 Co 7.

If the deft has fully accounted it is a good defence by way of plea in bar to the action – 3 Wils 113. 1 Com Dig Acc E.

If the deft admits in his defence that he has been once liable to acct – no special plea in ~~bar~~ of the action is good – unless it be fully accounting – or a release – or some defence wh destroys his liability to acct.

Other defences wh go to shew that the pltf ought not to recover must be pleaded before the auditors – Com Di 9.1.2. 3 Wils 73. 113–4.

If the deft ~~is~~ insist that he has fully accounted – or that his liability has in any way been destroyed – he must plead these facts specially – because it goes in avoidance of the pltfs allegns & not in denial of them.

Before the auditors the parties may plead & join issue in law or fact. Com D. 2 H. 3 Wils 73. 117. Cro El 46. 812. 1 Bac 71.

Whatever can be pleaded in bar of the action must be so pleaded to the Ct & not before the auditors – Com 2.9. 1 Bac 2. Com 73. 3 Wils 73. 114. 113. Cro El 82. 116.

And nothing can be pleaded before the auditors contrary to what has been pleaded in Ct & found – Therefore the pleas never bailiff or receiver – or a release – &c are not good before the auditors. Cro El 82. 3 Wils 113. 2 Day [illegible]

Account.

It is a good discharge for the Defᵗ to shew any thing wh could not be pleaded in bar of the action — but wh shews that the Debt is discharged &c — as if the property is put into the hands of the bailiff & has been lost witht his fault, this is good plea before the auditors. 1 Roll 124. 1 Bac 21. Co Lit 89. a.b. Com D. 211.

So also that the goods were taken by robbers or public enemies witht his fault — is good defence before the auditors Co Lit 89. a 4 Co 84 a Com D — 211-12. Stra 681.

It is said that it is not good acct that the prop was perishable — & that therefore he sold it on credit, unless his commission authorised him to sell on credit. 1 Bac 21. 2 Mod 100. This rule has been relaxed — Merchants servt —

In accounting the Defᵗ is allowed for all losses occasioned by inevitable accident — or robbers or pub: enemies — witht his fault — Co Lit 89. a

And if the Defᵗ be bailiff merely — unless bailiff in his own wrong he is allowed his reasonable expenses in managing the prop (Ib). 1 Lev 219.

When the award is returned to the Ct — the judgt is that the Pltff recover the sum awarded —

In this state auditors are not appointed by single minister of the L — he takes the acct himself — This action in Eng is not much in use — the more usual remedy is by bill in Chy — 1 Bac 16. 3 Bl 437. 442. 449.

Our stat has virtually given the auditors all the powers of a Ct of Chy —

The reason why they resort to Chy in Eng is that a Ct of L cannot compel the parties to produce their papers, writings &c

Debt.

3 Bl 154 The legal acceptation of the word debt, it is said is a
Co L 192. sum of money due by certain & express contract.
3 Com D 354. Eg. By a bond for a determined sum - note - & special bargain &c

Or for a sum capable of being ascertained. Eg. obligation to pay the amount of certain acct. - 1 H Bl 550. 560. Doug 6 Lees - as to the definition - for the action of debt lies in some cases on contracts implied. But not it is sd on con implied to pay an uncertain sum. If A sells goods at a fixed price debt lies - 4 Co 94(a(b) but if no price is fixed debt will not lie 3 Bl 155.

But as plff may now recover less than he sues for. it seems debt will on an implied promise to pay an uncertain sum 2 Bac 13. 1 H Bl 550.

This action lies either on simple con - specialty - judgt or recognizance, also for penalties in some cases - Debt on simple con has been disused in Eng by reason 1. by wager of L - Chit 219. Co Lit 155. 3 Bl 341. ie the deft swearing he owes nothing & eleven compurgators swearing that they believe him.
Wager of L is equivalent to ~~wager of L for~~ a verdict for Deft - it is doubtful whether six or eleven compurgators are necessary.
2d Because the whole sum demanded must be recovered if any thing 3 Bl 154: Dyer 219. 2 Roll 706. This rule is not now observed 2 Bl R 1221. Doug 6. 703 n/ 1 H Bl 249. 550.
Debt on simple contract has lately been revived in Eng - Chit 219. but is not in frequent use -

Debt.

In some cases debt does not lie upon express simple con^t Eg. vs Ex^r or adm^r or a contract of the testator 1 Lev 200. Chit 219. Plow 182.
The reason of this rule is that the testator might have waged his law. but the Ex^r & Adm^r cannot. Esp 192. 9 Co 89. Cro C 189. – wager of L not used in the country.

Debt lies on a promissory note vs the maker Chit 221. 10 Mod 38. this rule is perfectly settled as between the payee & the maker. Quere as vs the indorsee. Chit 546 Lond Ed. 5th
It is a ques whether debt will lie vs the indorser 1 Maid Entrees 312. Chit 221. Stra 680. 8 Mod 393. Bayl 99. Esp N P. Ed. 193.
Ques also in this case Bishop & Young 2 B&P 82-3 whether debt will lie upon a promissory note unless it be expressed for value rec^d.
If one expressly promises to pay a sum certain for goods delivered for his own use or for service rendered for himself – debt lies – otherwise if he promise for another – Eg. promise to pay another's debt – in this case debt does not lie. Esp 193. 3 Burr 1886. Chit 220. Dyer 21. n Cro El 880. 2 Bac 20.

On such promises there must be a special action on the case Esp 193. Roll 140. 193.
But it seems that debt will lie where the person for whose use he is never liable. 1 Ray 480.
Eg "deliver goods to J.S. & charge them to me". So debt lies not for payee vs the acceptor of a bill of exchange – he as between himself & the payee is rather in the nature of a surety. – the drawer is debtor & is liable to the payee Chit 220. 1 Roll 594 Dyer 21. a. 1 Vent. 152. 12 Mod 345: & vide Chit Bills 547. n)

Debt.

In Maryland debt lies not 1 Cranch 343. by payee vs the acceptor — nor in Virginia Chit. B 549 (n).

Debt lies in some cases on implied contracts Hob. 206. 2 Bac 14. Chit 220.
Debt lies sometimes where there is in fact nothing like a bargain — or contract or other commercial transaction from which to imply a contract — e.g. On a penal stat. where the penalty is certain & where no specific form or mode is required for a recovery of the penalty 2 Bac 14. 1 Roll 598.
The action in this case is a civil action 4 T R 456. 7 Do 257 — 2 do 203. Cowp 382 — 3 T R 448.

Tho debt lies not to recover damages — yet after damages are recovered debt lies on the judgt — for by the judgt the demand is made certain & become a sum due to the pltff 2 Bl 465 — Hob 206. 2 Bac 14. 1 Roll 600–12.
So upon an award of arbitrators to pay a sum certain 2 Stra 923 — an award is in nature of a judgt
When the Deft in judgt is in custody on the exon debt on judgt lies not 2 L Di 196. 4 Bur 2482. 1 T R 557. 6 Do 525. 7 Do 420. 8 Do 123.
So if having been in custody he is discharged with pltffs consent — debt will not lie) taking on an exon is a satisfaction in L for the time being. 3 Wils 13. 7 T R 421. 4 Bur 2482. — 4 Conn. — case Loomis & Storrs).

So if goods to the amt of the exon are taken debt on the judgt lies not — Salk 323. 2 Mod 214. 2 Bac 355: 1 Rol 551. otherwise if only part of the amt has been levied 1 Lev 92.

Debt.

Proper time for bringing ~~debt~~ on judgt

In Eng. Exn cant enter after a year & a day. & the remedy of the pltf ~~&c.~~ is by debt on judgt. Carth 30 Sidn, for after such term paymt is presumed.

But the stat Westm 2d gave a sci fa in these cases to shew cause why exn shd not issue - & if judgt is not shewn to be satisfied exn will be awarded on sci fa - exception - where exn has been suspended by writ of error - 1 Roll 899. 6 Mod 288. Carth

It seems to have been formerly supposed ~~that~~ that debt on judgt wd not lie within a year & a day rule now settled that it will lie 1 T.R. 639. 20 Johnson 342. 4 Conn. R. 442.

In Conn no time is limited for taking out exn

An erroneous judgt will support this action, for such judgt is available to all purposes till reversed 2 Bac 211. 7 T.R. 458. 3 Wils 345. 8 Co 142. a(c) Raym 196.

"By the constitution of U.S. full credence is to be given in each State to public acts" "records & judicial proceedings" in every other State. Qy where there is judgt in another State can there be any inquiry into the original cause of action. (Constn U.S. Art 4.–) Decided by the sup Ct in N.Y. that there may be 1 Dallas 219. 261. 188. Caines 460. 1 Johns R [illegible]. (contra in Conn & Penn. 2 Dallas 302.)

But it has been held in N.Y. that if the deft was personally summoned & appeared the judgt is conclusive unless it can be shewn that it was unfairly obtained 8 John 193. 15 [illegible] 121. 5 [illegible] 37. 5 East 475.n)

Debt

But if there were no personal notice no action will lie upon the judgt. Kirb 119. 8 John 173. 5 Johns 37. 2 Wils 297. 9 East 192

The present rule in N Y same substantially as here.

It is now settled by the Supr Ct of the U S that a judgt of a state Ct has the same credit validity & effect in every other state as in the state in wh it was rendered. & the same pleas that are good may be pleaded in any other state only. 3 Wheat 234. 19 John 162. 7 Mass 462. 12 Do 25. 2 Bay 485. Same Nor 485:

Whether a will of lands duly proved & recorded in one state so as to be evidence in that state can be evidence in another state quaere 10 Wheaton 469.

It is now settled that debt will lie on foreign judgts but they are treated as simple contracts only & are examinable. Doug 1. 2 H Bl 410.

& the plff in declaring need not shew the original cause of action. 2 H Bl 410. 5 East 473 n. se aside 1 Stark Ev 207 n. Stra 733. 4 Mass Rep 98. 2 Caines 502.

But the judgt of a foreign Ct is examinable here only when he who claims the benefit applies to have it enforced. Skin 59. 2 H Bl 410. Ray 473.

For it is then voluntarily submitted to the jurisdiction of our Cts - not otherwise upon it is pleaded in bar or used in defence Ib.

Debt.

To debt on such a judgt — nul tiel record is a void plea — (yet declaring on the judgt as a record does not vitiate the declarn) (Doug 6. Quære would it not be bad on genl demurrer

Indebr assumpt is concurrent with debt on foreign judgt Doug 4-5-6 & in tent is allowed on such judgt 1 East 436 -
When indebr assit lies debt lies Doug 6 — but this is not always true — where money is pd by mistake — or fraud &c 2 Bur 1000.
The rule is to be understood in genl only of specific promises to pay money & from those implied by an actual contract — Eg sale of goods with or witht a fixed price 1 H Bl 550.
So for work done or where the claim is founded on an actual contt of any kind.

On a void judgt debt lies not — Eg. on a judgt obtained by fraud — this means fraud in the proceedings Peake 76-78. 11 State Tr. 2 Ch Anne 462 — Eg If the service is forged by the pltff — Deft never having notice 6 Ta 514.

So in case of want of jurisdn over the subject matter debt or assumpt lies not. 5 John 37. 13 John 192 — 15 do 121. 4 Conn R 380.

Whether fraud or want of jurisn or fraudulent service of the writ may be pleaded to a judgt in one state when it is attempted to be enforced in another state. is still an open quesn in the Supreme Ct U.S. — 3 Wheat 236 n 15 John 147 n 1 Stark 214 n)

Debt

It has been decided affirmatively in many of the State Cts – 4 Conn R. 380. 1 Peters R 155;

In Conn on judgt obtained by foreign attachmt – debt it is said lies not vs the absconding debtor himself the object is to draw prop out of the hands of the garnishee – & the proceeding being in rem. 4 Conn R 380.

For money secured by bond or single bill. the action of debt is the only C L remedy. Cro El 494. 189. 6 Dane Ch 198. 2 Bac 13.
And it is the most proper action for due bills given for ~~the~~ money-
so debt lies on a recognizance Ch 198. also sometimes a sci fa lies
If a bond is given conditioned for the performance of a collateral act there is sometimes a remedy in Ch. it being viewed as evidence of agreemt to do the act. but the only C L remedy is the action of debt for the penalty. 2 Bac 13. – see Pow of Ch.
2 B R 388 In debt on bond it has been holden that damages may
Doug 49. be given exceeding the penalty in certain cases. e.g.
Burr 820. if principle & interest surmount the penalty.
2228. Contra 1 East 436. 1 Atk 75. 3 Bro Ch 489. 496. 2 B R 1190.
3 B C 432. 4 Day 30. 6 B R 303.
According to the strict import of the contract this clearly can't be ~~[illegible]~~ done.
But as even Cts of L now consider the penalty as only in terrorem. under the stat 8 & 9th Wm III the rule appears to be correct on principle

And in Cov^t it has been determined that damages can't be given for accruing installments after forfeiture. tho they exceed the penalty 4 Day 30. the interest has been allowed on the penalty.
On a cov^t to pay a sum certain debt lies 1 Roll 591.
So debt lies on a cov^t capable of being made certain by reference to a precise standard. Eg to pay $50. for each ton of goods transported.
If there is a cov^t with a penalty — the cov^{tee} has his election to sue for damages in cov^t broken — or debt for the penalty — unless it appears that the covenantor was to do the act or pay the penalty — in such case on the non performance of the cov^t he must be sued for the penalty in debt — 2 Atk 370. Stra 533. 2 P Wms 192-3. 2 Ves 528. 1 Br Ch. 418. 3 Burr 1395.

Debt lies vs an off who has collected money for a pltff in fi fa on refusal to pay it over. Chit 228. 2 Bac 14 Hob 206. Moore 886.
for levying it implies a contract to pay it over — 2 H Bl 550.
But debt will not lie vs a shff for collateral articles seized on fi fa & not sold for want of purchasers — 2 Bac 14. Cro Ja 514.
For debt is a sum of money due & the shff has not rec^d the money — & the shff is in no fault. & therefore the debt is not transferred to him.
But if the shff return collaterals at estimation in his return suff^t to pay the debt & costs & sh^d neglect to sell them, it would seem that debt lies vs him 2 Saund 344. n Ld Ray 1075.
But in our practice case is the usual action — for neglect of duty —
So if they are rescued. for he sh^d have the posse comitatus. Hob 206. Cro Ja 514. 2 Saund 344.

Debt.

Debt lies for rent reserved in a lease. It is the usual & appropriate action. Esp 188. Litt ed 58-92.

But where there is an express covt for the payt of rent covt broken is concurrent with debt.

In debt on parol contt the stat of limitns. payt or a release may be given in evidence under nil debet, the plea being in the present tense. Esp 262.

(Cases as to the stat limitations - Chit 1 Salk 278. 3 Bac 578. Ld Ray 566.

Debt lies not for rent vs tenant at sufferance, by the C.L. He is a wrongdoer. Esp 188.

Action of Detinue.

This action lies for the recovery of a specific personal chattle. It is in _nature_ of a bill in Chy as in its effect. as it gives a specific remedy - judgt is for the restitution of the thing detained - conditionally. _viz_ that if it cant be had. Deft pay the value & damages for detention. Co Lit 286. 3 Bl 152. Cro El 361. 2 Bac 45.

It lies to recover any personal chattle. wh can be identified, not for money - corn &c. unless in a bag. 1 Rol 606. 12-14. Com Di. Detinue B. 2 Bac 46-7. Co Lit 286.

It lies however for a piece of gold. of _such_ a value. but not for 20/ in money. Cro El 457. Co Lit 286.

It lies in those cases only where the Deft obtains possessn lawfully. as by delivery or finding. Com Detinue D. 2 Bac 45: 1 Rol 607.

For the action seems founded on contract, express or implied And debt & detinue may be joined in one declan 3 Reeve H. E L. 45: 4 Bac 11. 1 Ld 28. The genl nature of the action is the same as debt. 3 Bl 152. Debt to recover goods is detinue. 2 Swift dig. contra

It lies not for money lent - for that is not to be specifically restored. 2 Bac 47. Rol 606.

Trover lies in all cases in wh detinue lies. but not _e con verso_. for trover lies where the takeing was tortious.

The reason why detinue lies not when the takeing is tortious seems to be, that originally a tortious takeing was considered as divesting the owner of his prop - & in detinue the pltf must have the _prop_ of the thing demanded. Com Detinue D. - Better reason - founded on contract express or implied -

Detinue.

This action is in great measure disused by reason of the wager of L. & the certainty required in describing the thing demanded. Trover has taken the place of it under the equity of the stat. of Westm 2d. — 2 Bac 45; 11 Co 57a. Moore 481. Cro E 244. Yelv 198.

It is not however entirely out of use at this time. 1 NR 140. 3 Woodn 108

Notice & Request.

At com L. a request by pltf in actions on contracts is in theory always necessary. but in many cases it may be by suit only. 1 Saund 33. & n, Cro El 748. 12 Mod 92. 10 ib 38. Skin 133.

And in such cases the genl alleg "Tho often requested" is suffic. -it is then a fiction, not traversable - Sho 88.
But where actual notice or request is in nature of a condition precedent. actual notice & must be specially alledged & proved. & it may be a condition precedent either by the express terms, or from the nature of the contract. 4 East 500. 16 ib 110. 1 Camp 425.

Rule. Pltf must actually give & aver notice to Deft. in all cases where action lies not witht notice. as where it is expressly made necessary by the terms of the contract - so where the fact or event, on wh the demand arises is (as between the parties) confined to the pltfs knowledge &c. Eg. Promise to pay ~~so~~ at such rate as any other person shd pay pltf for the same (Com Di condition. T or L 8. Cro J 432. 1 Rol 463.151 ~~Hard~~ 42. Hob 51
(first rule in this section denied Kirb 188.)

So on a promise to pay on the day of promisees full age. Com Notice A. Latch 158. Cro J 57.
Secus: on promise to pay on promisees marrying a certain person as A.B.- promisor takes notice at his peril. Com Di pleader C. 75.
Ques-de last Eg- The marriage might be concealed from Deft.

So on promise to deliver so much corn. if pltf approve it. pltf must aver that he gave notice to ~~Deft~~ that he approved it - 5 Com 53. Cro El 249.-50. as to such contt see 3 TR 653 & qu whether it is binding -

Notice & Request

So on cont. to acct. before auditors whom obligee shall assign - pltf must aver notice - 1 Roll 462. Com Di pl C 73.
Otherwise of a promise to pay on a certain act by the promisee - Eg on his return from London - or when he delivers a certain horse to J.S. Cro J 102. 228. Com D. Pl. C 75 - 2 Buls 145 - contra Hob 48. 1 Buls 44.

If the Deft contr to pay on performance of an act by a stranger, pltf need not aver notice - Deft must take notice at his peril - Eg A promise to pay when J.S. marries. 1 Roll 462 (pl 10) 463. l 6. 2 Buls 144. Hob 14. 2 Hen Bl 315-16. Com Di Con. 2.5. Col Di 131. 257 (2 Ed) 1 Chit Pl. 319-20 (& n.) 4 Day R 444. 10 Mass 230. 238.
Eg to pay as much as J.S. shall direct - or to pay the cost wh shall be taxed in a given case. Com D. Pl. C 75. Cro El 133. 452. 684. 2 Buls 144. 8 Co 92. 4 Mass 230.

Whether the pltf must make & aver a special request depends upon its being a condition precedent or not - Com Di Cont. L. 11. Eg Deft engages to do a ~~collateral~~ thing no day being fixed on request - as to deliver specific articles. Com D Pl. C. 69. Condit. L 10-11. Cro El 85.
Eg promise to pay a collateral sum on request as a debt of a stranger. 1 Saund 32. 2 Keb 26. 1 Sid 303. Cro El 183. 523. 634. Sha 88. Col Di 131. 3 Salk 308.
So to pay on request such sums as promisee shall expend for promisor - Com D pl C. 69 Cro El 83-4-91. Chit. Pl. 322. The request in these cases is part of the consideration & is traversable.

Notice & Request.

But where the promise or express request is merely to pay what is already the promisor's duty to pay — 2 Sd 131. 1 Wils 33. the sum is not collateral & a special request is not necessary — 6 East 555. as in cases of a promise to pay on request, money before lent — the request is not part of the consideration of the request — as the duty exists independently of the promise or request as the duty exists independent of the express request.

Actual request is not necessary where the duty or debt is precedent to or independent of the promise or undertaking on which the 2 Salk 318 3 Lev 205 Salk 93. 205. Cro El 94.

In these cases the duty did exist with the promise the request therefore is not of the gist of the action the allegation "often requested" is suff't.
the rule is otherwise in the cases above stated of a promise to pay another's debt on request — for in those cases the duty does exist independently of the promise —
1 Saund 32-3-4 n.) Yelv 66. 2 Buls 229.
Ex. I promise that if such a debt of mine is not pd by such a day I will on request pay double the sum due — here special request is necessary —

In an action by the payee vs the maker of a promissory note no actual notice is necessary unless the note in body of it is made payable at a particular place — in that case demand at that place has been held necessary — otherwise if appointed in a memorandum — 2 Philips R 8. 14 East 500. 16 ib 110. 1 Camp 425: — contra. 3 John R 202. 4 do 183. 9 ib 208. 3 John Cases 71. 7 East 388 n 2. 4 Conn R 465: 17 Mass 389. 17 John R 248. demand not necessary in Conn. 10 Mass 38 1 Wils 33.

Notice & Request

Where a special request or notice is necessary the time & place must be averred. Cro J 183. Lutw 231. Cro El 85.

For the request or notice is traversable. but this does not apply to cases in wh the genl issue involves a denial of request - for the allegn is not then specially traversable - Eg Indebt. aft on bill of exchange vs indorser - "in wh Deft has had notice" sufficient.

Thus upon a promise to pay upon condition to pay if J S does not pay - on request - a special request ~~of~~ to J S must be averd Cro El 85: Such request is condn prect to the action.

The want of averment of special request when necessary is not aided by verdict - the request is a condition precedent Com D- Pl C 69. 3 Buls 299. Cro J 183. Cro El 79. 85. (1 Day 183 contra) 1 Chit R. 325. 10 East 359. contra)

Where the request is necesy to be averred specially. the avert is traversable - unless the genl issue involves a denial of it. Palmer 389. 3 Salk 308. Cro El 79. But it seems that it is never traversable where the genl issue involves a denial of it

Where the allegn of notice is unnecesy the allegan is surplusage & need not be traversed Salk 622. Carth 473. 1 Sel 194.

It is a genl rule when there is a contt do any thing on demand & Deft cant discharge himself by tender without request - special request is necessary - Eg Merchnt agrees to deliver on demand such a num of goods on a day fixed - for he cant select the goods. In such cases an actual ~~[illegible]~~ request is from the nature of the case a condition precedent 3 Salk 308. Cro El 85.

Notice & Request

Rule otherwise if the goods ~~are~~ to be selected by a stranger here the merch^{t} sh^{d} request the stranger to choose. 3 Salk 308.

Cov^{t} that Lessee shall repair & Lessor find timber - Lessee must demand the timber. Com. Condition L. 10.

When demand is necessary to subject indorser see Bills of Exch.

Assumpsit.

This is an action of trespass on the case to recover damages for the breach of a simple cont. 1 Sel. 52-3. 3 Bl 158.

The action is derived from the stat Westm 2 13 Edw 1. & was not known to the C.L. 3 Reeve H E.L. 58. 2 Do 202-3. 243. 89. 371.

And all contracts not under seal tho reduced to writing are simple or parol cont. an unseal writing is only evidence of a parol cont. 7 T R 351 n. On cont by deed or specialty this action does not lie. the remedy on such instrum is debt, or cov broken Cr El 187. 2 Bac 13 Cro J 515. Esp 198.

Cont upon wh this action lies are either express or implied - in the former the promise or agreet is actually made ie expressed by the party bound in the latter is ~~a~~ raised by implication of L 1 Sel 53.

In the latter case the promise wh is a fiction is raised or implied from an actual debt or duty wh in pleading is alledged as ~~a~~ the considn of the promise raised - Esp 1. 1 Sel 53.

But tho the L will imply a promise from an indebtedness - but a considn of itself can never of itself ~~can~~ ~~never~~ be raised - 1 Sel 53. 2 John 237-8. 3 Caines 28 Cai. 5 T R 582. 7 do 351 n.

The L ment has to some extent varied this rule
Bills of Ex sec)

The action on implied contr is called Indebit. aſsumpt from the alleg. in the declar. that the Deft being so 'indebted aſsumed & undertook'-

Indebt. aſst is in the nature of an action of debt, the debt being stated as the consider. of the promise & the recovery is in fact of a debt together with special damages, if there be any. Esp 1.

The whole recovery is under the name of damages-

But the promise even when it is implied by L is always alledged in the declar. the same as an expreſs promise is-.

It is considered as expreſs upon demurrer or motion of arrest of judgt- Cowp 249.

There is no such thing as an implied promise in pleading (Ballantine 220. 6 Mod 131.

On the face of the record it is always taken as expreſs. & that the promise is implied can appear only in evidence.

Aſst being an equitable action lies in all cases (gen.) in which the Deft is bound on the prin of natural justice to refund money recd. of pltf or pay it when pltf has legal right to demand it. Esp 1. 2 Burr 1012. 3 Do 1354-7. 1384. 4 Do 1896. 2 TR 370. Cowp 116. 796-7.

And hence any equitable defence is genly suffct (16). Where it is not ag conscience for Deft to detain or refuse to pay the money sued for- he is genlly not liable in this action.

Assumpsit

Indebt. Assumpt for money had & received.
This form of the action lies to recover back money pd by mistake 1 TR 285: Cowp 565. Doug 637. 670. 5 Burr 2639. Burr 1984 4 TR 553.
or money obtained by the fraud of one party Stra 915. Doug 671. Cowp 182. 493. 4 TR 485; Burr 1005: 2 Esp. R 522. Esp D. N.P. 14. 2 Day 225: Bokes R 11.

So where an insurer has pd a loss where the warranty has not been complied with Esp 2. 1 TR 343.

So if one pays money in the belief that he is under an obligation to pay it - when he is not - Esp 2. 1 TR 285: 1 H. 3 Mass 74. Doug 637. Eg payt in full of a debt to a bankrupt when the payer is entitled to a set off he not knowing that he was so entitled - 2 East 469. Doug 451. 654. Stra 1246. 2 TR 713. 3 Burr 1670. Peak 202. Chit B 104-2. 158. B & P 226. 3 TR 757. 5 Taunton 144.
So if a man having wife marries under the pretence of being single & recd money of the wife de facto she may recover it back in this action Esp 2. 1 Salk 28.

So if on settling accts of too large a balance is struck by computation & the whole balance is pd the excess may be recovered back Ld Ray 1217 Esp 2.

In an action for money pd by mistake it is not necessary to show that the Deft was guilty of any fraud. Esp N Y Ed 2. Peak Ca 94. 6 TR 606.

But money pd under rule of Ct can't be recovd back as having been pd by mistake tho' it shd afterwards appear not to have been due. Esp. 2. 2 B R 648. A recovery wd collaterally impeach the record — it is like the case of money before recovd by judgt — Id. d. — (here can't the record of the Ct be impeached)

So also money pd on a forged bill of exchge to a bona fide holder can't be recovd back Esp. 2 3 Burr 1354. for the Deft can in conscience retain the money & the laches if any is on the pltffs side —

So if one voluntary pays money with a full knowledge of or the means of knowing the facts that prove him not indebted — he can't recover it back Esp. 2. 48. 2 East 469. 1 B&P 296. 2 Bl R 824 — 4 Esp R 221. 2 Do 723. 13 R Co. 1 Esp R 259.

So where a party being sued & protesting that he is not bound to pay & does pay — he can't recover it on this ground of objection — tho it might have furnished a good defence to the claim made upon him 1 Ld Ra 99. 89. 2 Do 540. Peak Ca 35.

Liability of Principle & Agent — as to payts made by mistake to agent &c — with distinctions.

1st If an agent obtains tortiously under colour of authority of his principle but actually for himself he is liable at all events as for money had & recd to the use of the payer — & a subsequent payt over wd be no protection to him. Cut 5: Cowp 182. 204. 4 T R 485 — 3 Esp Ca 231.

2 The rule is the same if he obtained it for his prin by any wilfull wrong of his own — as by extortion — violence or fraud — the payt ~~was~~ can't avail him — for a servt when guilty of a wilfull tort is per se liable — Esp D. N.P. 19. 26. Master & servt — 3 Cst Co 231. 3 Lev 262. 1 Chit Pl 24-5.

3 So if he receive money bona fide for his prin but without right — as by mistake he is liable — provided he is not a known agent & has not pd the money over. for he can't in conscience retain it as between the payer & himself — Cowp 565. Esp P 109

Suppose the money were pd over by the agent after a claim of repayt — it is made a ques — whether he is liable — better opinion, ~~that~~ that he is — 3 Bur 1985. 5 Ti 2639. Esp 109. N.P. 210.

But if the receiver thus acting bona fide made a mistake & is a known agent & the money is pd to him as such he is not liable even tho the money is not pd over. the payt is in truth & with the payers knowledge made virtually to the prin 1 Cam 337.

Besides the agent ~~tho~~ is in no more fault than the payer & the payer knows that he has a remedy vs the prin — it therefore would be inequitable to subject the agent 4 T R 553. Esp 109. Bull 133. Strange 480. Ld R 1210-11. (Salk 27 contra not L) 4 Bur 1984

The rule is the same if he were not a known agent if he has pd over the money to his prin – for he honestly recd the money & has honestly pd it over –
Cowp 565 – Esp 109. 110.

And where an agent duly authorised – actually & honestly receives ~~honestly~~ money for his prin – but wht cant be in conscience retained – the prin is liable whether the money is pd over to him or not – Stra 480. 1 Cam 337. Esp 110.
(if the money is not pd over is not the agent liable)

II – Second genl head.

To recover back money pd on a consideration wht ~~fails~~ happens to fail. Esp 2. 1 Burr 1012.
Eq. to recover back money pd in consideration of the grant of an annuity, wht proves to be void, for informality Esp 2-(7). 1 T R 732 – 2 do 366. 1 Esp Ca 63. 6 East 241. 4 Esp R 196. 3 East 16 – Peake 44.
Failure of considn ~~consid~~ within this rule consists not in the value of considn
2 Day 437.
But a recovery cant be had in such case unless the grant has been set aside. or grantor has refused to pay the annuity – or to execute an effectual grant – Esp (3). 1 Esp R 309. 3 do 102. 261.

It lies to recover back freight pd in advance for the carriage of goods wht are not carried, if the failure is not imputable to the owner of the goods. Esp (9). 3 John 340.
. . the voyage is commenced the freight cant be recovd back
Com Con 304

So to recover money pd in advance for the purchase of lands proposed as which the vendor cannot or will not make good title - or which differs from the description given of it in the contt Esp (9). 1 Esp R 150. 3 B&P 162. Palm 364. Bur 2639. 2 Day 435.
15 R 65 2 Esp R 639. 5 John 85. (6 JR 606.) (contra if the money were pd
2 Esp R 722 voluntary - or with the means of knowing; Esp (12) 4 Esp R 221

So where advanced to a person, for an act to be done by him in future. & he disables himself to do the act - it may be recovered immediately. 2 Esp 522 - 1 Str 480. 5 Co 21. Com Con 304-334. (1 N R 35)

So if money has been advanced on an agreet for purchasing an estate, & the payer recedes from the agreet in consequence of the other parties misrepresentations of the condition of the prop - the payer may recover with the money advanced ~~his~~ expenses for conveyances prepared & the interest of the money pd for the purchase Esp D. 11. 1 Esp R 268.

But to recover such expenses the declan must be special. i.e. must specially allege them - the comn money counts are not suffnt - Esp (11) 4 Esp R 21. Sel 541-2. 2 Chit. R 125 (n) 1 Bos & P 306 - 3 do 246.

III. Genl Head -

It lies to recover back money pd ~~on~~ under a void authority. Eg. A being indebted to B. C made a forged power of atty & sues in B's name, for the debt - recovers & embezzles it. A may recover it back from C. as money had & recd to his use. Esp 3d (12). 1 T R 59.

So if A forges a power to himself, to receive a debt due to B & receives it - B may still recover it of the debtor, tho the latter may recover it back from A -

IVth Genl Head

Aſsumpsit.

So too it lies to recover back money obtained by extortion - oppression - imposition or any undue advantage taken of another's situation. 2 Bur 1012. Stra 915: 4 TR 485 - Cowp 182. 793. Doug 671 - & if more than debt due & legal interest is extorted by the pawnee - of the pawnor - in consid^n of redelivery of the pawn - the excess may be recovered back Esp 4-5: 2 Stra 1155: So if money is pd by a bankrupt or his friends to a creditor as the condition of his signing the bankrupts certificate Esp D. 5 - (14). Doug 671. 2 TR 763. 3 Dallas 357.

So where money had been obtained by unfair or fraudulent means, tho the party obtaining may have had a legal right to recover it.* & where the son of &c was entitled to a bequest. but obtained it under a forged certificate of the marriage of his parents. (*N.B. his right depended not upon a com^l conviction). Esp (15) Contra. Camel 128. Doubted by S J.)

Aliter - where money has been obtained by judg^t of Ct of competent jurisdic^n (not reversed - nor in any way set aside) or by arbitrators. tho the judg^t &c were obtained by fraudulent means - as by subornation of perjury. Esp D (16). 1 Day 130. 7 TR 269. 3 Ib 125:. but see 2 Bur [illegible] 1005. (2 H BC 416) 7 TR 269 - Esp (19) - The reason to the gen^l rule is that the record is an estoppel -

But if the judg^t &c has been reversed on writ of error the money may be recovered back Esp 6d (16) 2 Bur 1009 So where a judg^t is set aside for irregularity. & money levied under a warrant, or sentence, wh has been quashed. Esp 6. (16). Bull 131. Cowp 419.

Money pd on a compromise pending a suit may be recovered back. if pd by mistake or obtained by deceit.

Assumpsit

If money pd on a judgt. afterwards reversed – has passed to a third person, upon fair consideration. it, cant be recovered back from him – tho he was the atty ~~&~~ or agent who obtained the judgt. Esp (19). Doug 152.

V. It lies to recover money imbezzled, as money had & recd. Ex where ones servt or agent wrongfully appropriates to his own use the money of his master or princl. Esp (17). Bul 130. 1 Esp R 172. Peakes R 223. 6 Term 226.
And in such cases it has been holden that infancy is no defence. The action tho sounding in contt being founded in substance on tort. Esp (17-18) 1 Esp R 172. Peakes R 223.
Quere. if the inft was entrusted with the money by the plff. – as it wd then be recd upon an express or implied contt of bailmt – 8 TR 335 – & Master's cont 1 Keb 905 – 912. 1 Lev 169. 1 Sidn 229. Com Con 619-20-21. 2d Edition
So it may be recovered from a third person who has recd it illegally – or mala fide from the servt or party embezzling – if it can be traced to him. as where the servt has passed it away upon an illegal contt or lost it by gambling. Esp (18) Cowp 197. Loft 756.

VI A party who has pd money on an unlawful contt may in g. recover it back in this action – unless he was particeps criminis. Ex money pd to an insurer of lottery tickets – the insurance being illegal & void. by stat. 12 Geo III. Esp 6 (20). 2 Bl R 1073. 1 H Bl 65 – 6 TR 405.
So where money has been pd as interest. but exceeding the legal rate, the excess may be recovered back – as money had & recd. Esp (20). Talbot 84. Str 915.
Aliter in genl. if the party paying was particeps &c. thus the insurer in the above case if he had pd losses could not recover the payt back – he being the guilty & the only guilty party under the stat. – Esp y. 20-1. 1811. Cowp 791. 8 TR 575. 1 Pow C 201

So where a contr. is made in a foreign state, is in violation of the laws of that state – rule the same). Esp. (23). 2 Caines R. 147. But if one has been engaged in such transactions, thro' the imposition of a partner – has pd premiums recd to the latter he might recover back from the guilty partner.

But tho' the genl. rule is, that when the parties are in pari delicto, the action will not lie, yet if the contr. continues executory (as to the illegal act contemplated) – the party paying may recover back – & thus rescind the contr. Esp. (21). Doug. 450. or 481. Marsh. Ins. 552-3. 1 Pow. C. 217. Bull. 131-2. – Salk. 22. & 3 T.R. 578. Cowp. 790. 1 B&P 289.
Ex. Money pd as the considn. of the payee's using influence to procure a public office for the party paying) – Before the office is procured this action will lie to recover it back (Esp. 21). Doug. 470
But holden aliter by Buller J. where the contr. too grossly immoral to be discussed in a civil action – as a case of money pd. as a hire for murder. Esp. (21-2) 2 Bos & P. 467 – sed qu.

But when an illegal contr. is executed – the parties being in pari delicto – the genl. rule applies – not recoverable back – as if the office in the above case had been obtained before action brot. – 4 T.R. 560-1.
Quere – as to the correctness – or principle of this distinction. Does not policy require that the money shd be recoverable back in both cases – or in neither. 7 T.R. 535.

So where money is deposited with a stake holder on an illegal wager has been pd over to the winner after the event decided – with the consent of the loser – it cant. be recovered back from the winner. Esp. D. p. 19 (22-5-5-6) & 7 T.R. 535. 1 B&P 3. 298. Doug. 696 (n.)
And the rule seems to be the same if pd over witht such consent. Esp. (25-5-5) 4 John. R. 465.

But if the stake holder has pd over to the winner after being prohibited to pay & action brot by the loser - the stakeholder himself has been held liable - Esp 19. (55). 5 T R 405. Esp (25) 3 East 222. 4 John 426.

But the rule seems to be the same tho no action brot by the looser, ~~tho no action~~, after a prohibition only - Esp (24)

It has been a ques whether a winner can recover from the stake holder any more than from the loser himself if there had been no deposit - It wd seem that the money cant be recovered from the stake hold 3 East 222. Marshal 43. 2 Bay 89. 5 T R 407. 1 B & P 3. 299. 1 H Bl. 64. 2 do 1045. 2 Wils 309. Comd. 273-4.

It has also been holden that if money has been deposited upon an illegal wager & not pd over - either party may recover back from the stake holder - even after the event is decided - as he cant in conscience retain is the depositor. Esp (181) 3 East 222. 4 do 381: n 7 T R 535. contra 4 John 426. Esp 19, 25. 55-7).

But may not either party countermand the authority given by himself before it is executed. (& it has been decided in Eng that money may be stopped in transitu 3 East 222. Esp 24.

The rule in N Y incorrect, & the Eng rule correct.

It was once holden that money pd before hand to one of the parties of an illegal wager might be recovered back after the event tho in his favor. 7 T R 535. sed vide 1 East 98. & 8 T R 575. 4 John 426. current of authority contra-

If money has been pd on an illegal contt to a third for the use of the other party - the latter may recover it from the third person -
Ex - Money pd on a policy of insurance to a third person to the use of the insured - Esp (24) 1 B & P 3, 296

If one of the parties elects to pay a third person has no right to prevent it (56). The third person is a mere depositary - & not a stakeholder in the case -

In genl. where a claim is given to money in L this action of assumpt lies to recover it.
Ex lies to recover the penalty incurred by a by L -&c Esp 6-(257. 2 Lev 252-

But in such cases the declar must be special - there is no genl count adapted to the case-

But the action of assumpt does not lie for penalties inflicted by the stat of the State - debt is the usual remedy in such-

Assumpsit

The action lies for a recovery of an allowance by L— or reward permitted by L—
Eg As toll allowed for keeping a bridge &
Esp. 30. 3 Bur 1408. 1 Bl. R. 413. 2 do 764.

Indebitatus Assumpsit— for money pd laid out &
Where on has laid out money for the use of another at his request express or implied— the L implies a promise of repayt for wh this action will lie
Esp. 10— (23)— 1 Bur 373.
Eg If A at B's request pays B's debt due to C— & the action lies tho the money was pd on an illegal contract between B & C.. Esp 10. (31—33). 2 Wils 309. 1 Mass 139: A is not particeps criminis—

So if one of two jt debtors pay the whole debt hereto he may recover a moiety of the other— Esp (33). 3 B&P 225: 5 Esp 194. 2 T R 282— 8 do 186.

But this rule does not hold as between two jt trespassers— one cannt recover vs the other 8 T R 186.
But it is a genl rule that no person can by voluntarily paying another's debt— witht his consent (express or implied) recover from the latter the amt so pd. Esp 10. & 3 R 310. 613.
Excepn by the L mercht

Yet if A is compelled by process of L to pay money for B. it may be recovd back— if A was guilty of no wrong— Esp 10. (31)— 86— (176). 2 T R 104

And the rule is the same A being compellable to pay & does pay— Eg A's goods being in B's possession & are distrained for rent by B's landlord— & A is obliged to pay the rent to recover back his goods— here this action lies vs B.

So where a surety pays the debt of his prin either with or witht suit— Esp 10— 96. (31. 190). 2 TR 104. Cowp 525: Kirby 139.
Formerly supposed that there was no remedy at L— but that it was in Chy— however rule is now well settled that there is a remedy at L.
And the rule is the same tho the money was on an usurious cont. 1 Mass 139. ev. 9. 133.

And it has been holden that if the surety instead of paying money— gives his promissory note. & the creditor accepts it. this action will lie vs the prin.
Esp D—(32) 10. 3 Wils 14. 2 Esp R 591. 5 Mass 299. 1 H Bl 239.
But it has since been holden that giving a bond thus accepted as payt— it will not support the action of money pd. &c. & the last case does appear to be doubted. 3 East 169. Esp 32. 5 John 272— 5 Esp 1. 2 Barn & Ald 52. Stark Ev 99. 101.
5 John 272.

The ground of this latter determination is that a bond given is not to any purpose as money pd— (if a ~~its~~ note be or bill)— 3 East 172
Quere— In this liberal action is it not suff. that the Defts debt has been pd by the surety— of what importance is the manner of paymt— especially to the Deft.
1 Chit Pl 341— & 2 do 89. it is said the declarn shd be special for not indemnifying. 3 East 169. 8 TR 610. 7 do 204.

Assumpsit

If one of two sureties becomes such at the request of the other the latter having pd the whole can't compel the former to contribute at all. 2 Esp R 478. 12 Mass R 102.
there is no equity on whh to ground a claim for contribution

In a cont. of sale if any thing affecting the title is concealed by the vendor. & money pd in advance the vendee may waive the cont. & recover the money so pd. 5 Bur 2639. 6 John 5. Ib 274.

But if one witht title contracts to sell, but obtains a suff. title before he is required to make the conveyance. the vendee can't rescind the cont. 7 Ves R. 202.

And it seems that in sales at auction where the vendee is entitled to recover back. payt over to the princ. is no defence to the auctioneer – he is regarded as a stake holder Esp (38). 5 Bur 2639.

But when the vendee sues for damages for the non performance of the cont. the action shd be vs the princ. – unless the auctioneer refuse to disclose his name – in whh case the auctioneer is considered as the princ. Esp (38.42). Peake's R 120. 1 TR 132. 2 H Bl 593. Doug 93. 1 H Bl 17. Cowp 418. 7 TR 141. 5 East R 449. 7 Ib 244.

The willful concealment of latent defects amts to a fraud. Esp (40) Peake's Ca 229. Peak R 115 — that it amts to a warranty Esp D 629. 632. 2 Swift Sys 120.

But the rule is otherwise if the defects could be easily discovered. 2 Day 128. Esp 411.

On a cont of sale if the price is pd & the vendor does not deliver the prop according to the cont — the vendee may recover back his money had &c thus disaffirming the cont — or sue for damages for the non delivery of the prop — & thus affirming the cont 1 Str 407. 2 Bl 448. Esp 411.

When a vendor gives credit for goods sold he can't in genl sue for the price till the term of the credit expires. Esp R 430.

But the rule is otherwise if the credit was obtained by fraud — as if one falsely pretending to be responsible. 1 Esp R 430. 2 do 522. 6 John 110

So on a cont to pay for goods in three months by bills at two months — he can't sue at the end of three months — but he may have his action for damages for not delivering the bills Esp (49) 4 East 144. 3 B&P 582.

If a vendor accepts the security of a third person & that person becomes insolvent the vendor is not bound to deliver the goods unless he has agreed to 2 Caines. Esp 145. 4 Mass 405.

After a complete cont. of sale — the vendee refuses to pay the price or receive the goods the vendor may sell them to another & if sold for a less sum he may recover from the first vendee the difference of price — This to say the least of it is a novel rule — tho perhaps correct — S.M.H. thinks it founded more on usage than on any analogy to the l. — Esp. D 50. 5 Johns 395; 7 BR 74. 2 Kent Com. 399.

If a sale of goods is made & they are not delivered — The action on the price ~~shd be~~ for goods bargained & sold — & not sold & delivered — A symbolical delivery is however suff.t to warrant the pleader in counting the goods as sold & delivered. Esp. 50. 2 Chit. 17. 4 Esp. R 61. 157. 1 East 194. Symbolical delivery 2 Kents Com 393-4-5.

And if the vendor recovers the price where there is no actual delivery or symbolical the vendee may maintain trover for the goods if they are detained by him (Id.)

On an agreem.t to a purchase the vendee is not bound to accept conveyance by an atty of the vendor — because it multiplies the necessary proof on the part of the vendee — Esp. 50. 1 BPR 115: 2 do 268.
Hence an offer by vendor to convey by atty does not prevent the vendee to maintain an action for the nonperformance of the vendor

The action of assumpt is the appropriate action to recover money fairly won on a lawful wager Cowp 37-729.
This is not the place to enquire what wagers are ~~or~~ are not legal ~~wager~~ — for that see title cont

But to recover from the loser money won upon a lawful wager the action must be special — because genl indebt assumpt is not adapted to the case of money won on a wager. Esp 56. Ld Ray 69. Salk 23. Carth 338. 3 T R 704.

By the stat 11. Geo. 2d the action may be maintained for the use of lands & tenements — where the leasing is parol — or on agreet express or implied to pay the rent — & a parol agreet as to rent may be proved as ~~[illegible]~~ to the amt & damages which he is entitled to recover. — Esp 20-165-8 — 1 T R 378 & do 327. 2 Bl R 1249. 1 Wils 314. 1 H Bl 235.

But if the letting was for any unlawful purpose — the action cant lie. The L will not lend its aid to enforce an agreet founded on an illegal considn — much less will it imply.

Eg — Apartments let for prostitution — store house let to receive smuggled goods. 1 Esp R 13. ~~Esp~~ 14.

It lies however ~~tis~~ in favor of a tent at will who has under let — because the action being founded in equity & good conscience — & in equity & good conscience the Deft ought to pay to him Esp 54.

And the rule is genl that where the Deft has enjoyed the premises by demise or permission he cant ques the pltffs title to the estate - 5 BR 4.

The action of assumpt for use & occupatn is transitory - it is so treated because the title is not material of course -

Hence the venue need not be laid in the declaran or if it be wrongly laid the pltff may recover unless he is misled by it - Esp 61. 2 Rains 374. 1 Taunton 578

Where there is no express promise & the facts exclude the presumpn on which an implied one is founded - assumpt wont lie - Esp 86. 176.

Thus if assumpt for money laid out & expended & it appears on the trial that the money was pd witht the consent either express or implied of the Deft - the jury wd find for the Deft -

So if A be indebted to B - $100. & C - witht the consent of A pays the debt to B - he cant maintain his action agt A - 1 Esp R 309. 6 East 392 - & 8 TR. 610.

And a mere voluntary courtesy will not support the action of assumpt. Esp 84 - 179. Hob 106.

A voluntary courtesy is an act by one person for the benefit of another gratuitously or witht a certain prospect of recompense Esp 84 - 179. 2 Stra 728 -

Eg - services by one with the hope of a legacy by it he can have no action -

But if the services were done at the request of the Deft - it is otherwise - Hob. 10. 105.

In gent any thing wh is done by a per in the course of his occupation - tho witht request - is not deemed a voluntary courtesy - Eg. Com car. transports goods witht order - & the latter accepts them - assumpt may lie - - here a gratuity can't be supposed. Esp 88. 178.

This action can't lie for the breach of an agreemt founded on an illegal considn Esp 88-90 3 TR 454. 1 Lev 174 6 TR 405 - 7 East 630 - 2 B&P 371.

Nor will it lie on a cont of an immoral tendency - 1 Esp R 13. - 4 Esp R 97. 1 Camp 348. 1 B&P 340.

So if the considn is but in part illegal assumpt can't lie - it is void in toto -
Eg promise made to pay shff to pay him a given sum - in consideration

If one has been compelled to pay money for his own breach of duty - for the debt of another - he can't have assumpt to recover it back -

This action does not lie on a promise to pay the pltff for doing that wh it was his duty to do witht reward - if a prome is made to a shff to pay him if he will take bail - where it was his duty to take bail - no action lies for the breach of this promise - Esp 93. 186 - 2 Bur 924 Cro J 103. Peake R 72. 1 Esp 104.

Assumpsit.

Nor will this action lie upon a cont^t made to defraud third persons. Esp 93-4. Doug 433. 3 T R 551. 4 do 166. 6 do 246 – 4 Dall 372.

In such case the pltf has neither equity or good conscience on his side – thus if a promise is made to an agent to pay him money if he will destroy a bond of his prin^l or him –. Nor in gen^l can assumpt ~~can~~ be maintained to enforce an unconscionable demand – Esp 94-5 – 187-8. Cowp 393-116.

Esp 96. (189). 1 Co. 219. 723 | 6 Co 45. Esp 164. Nor will it lie to recover a debt due by specialty – in such case the action sh^d be upon the deed as debt – as the simple cont^t is merged in the deed.

If the Deft in a judgt promise to pay the sum recovd in consid^n of forbearance such promise is not valid – so promise made by obligor in bond in case of forbearance – Cowp 129.

But such a promise is good by a third person – as there is suff^t consid^n to support the promise – (subject to stat of frauds &c –) Esp 190. 6 T R 196. 1 Barn Con 429. Dyer 231. B.

The gen^l action of assumpt for money had & rec^d will not lie if the claim depends on a ques of right not fairly triable in such an action – because the gen^l count is not adapted to such a case –

Thus if the pltf right to recover depends upon a litigated ques^n as to right of common &c – Cowp 418. 818. Burr 915.

And it has been holden that this gen^l action of money had & rec^d is not adapted & can^t be maintained where the ques^n is of warranty of an article wh^h has been sold. 5 East 449. 7 do 274. contra 3 Esp 83. 1 Sel N P. 688 n

The action for money had & rec^d lies for money only strictly so called—
It can't be maintained therefore for stock in public funds—nor for bank notes—tho the L. treats them for most purposes as money— Esp 99. 197. 5 Bur 2589. 2 Blk 684.— 3 Conn. Hoqua vs Hoadly.

When one party has agreed to deliver a certain quantity of goods by a certain time—& delivers but part of them he can^t before the expiration of the time recover for the part delivered—nor can he ever recover unless the vendee agree to accept that part for the whole—& unless the whole is delivered the vendee may recind the contract. Esp 139-40 249) 7 TR 181. 3 John 534. 2 NR 61. 3 Bulo 325—

If a purchase of goods be made by sample & the bulk of them does not equal the sample the vendee is not bound to accept or pay for them—& this tho there were no fraud in the vendor—for it is an implied condition that the bulk ~~#~~ shall correspond in quality with the sample—& if the vendee has p^d the price he may recover it back—
Esp 248. 1 Cam 113. 2 East 314. 5 John 395. 13 Mass 139.

Assumpsit.

If the agreet which is the foundation of the action is special, the pltf must declare upon the agreet this rule of L is framed for the purpose of giving the Deft notice of what agreet he is sued upon. Esp 130. 249. Doug 24. 1 TR 134. Bul 139.

However a genl count upon an implied promise may be joined with a special count in the same declarn upon the same contt Doug 628. Esp 140. 268: Bul N.P. 139. 1 B&P 354.
And if the pltf fails of proving the special agreet he may go into evidence & prove upon the genl count & recover for the same thing. 7 John 132. 1 Sel 83. 6 TR 320. 3 ib 412. 444.
Thus – the pltf has agreed with the deft to build him an house. he brings his action for the price – the first count is for building the house – the 2d for labor done – now if on trial the pltf fails to prove the special agreet – he still recover on the genl count –
On the other hand if there is a special & genl count & the pltf proves a special agreet still subsisting & unaltered – but diff from that alleged he cant recover on either count. he must bring a new action – Bul 139. 1 Selw 83. Stra 638. 725. 1 NR 354. 3 Bur 1525: 2 Do 1011. 1 Wils 117. Esp Di (264-5).

If the special agreet which is entered into is not exactly fulfilled – as if the agreet was that the house shd be three stories high – & it shd be actually built only 2 stories high – here the pltf might recover on the genl count by showing the Deft agreed to have it built two stories only – & did thus accept it –

When the pltf recovers on the genl count the Ct treat it as tho there had been no special agreemt 1 Sel 83. Stra 638. 735 – 10 R 354. 3 Burr 1 Wils 117. 2 John 235 – 7 do 132.

It has been determined that a seaman under a cont for the whole voyage – & is disabled during the voyage he is entitled to wages for the whole voyage – this is peculiar to the marine L – 2 H Bl 606.

If one having agreed to perform a certain undertaking for another & leaves it unfinished witht the consent of the other he is not entitled to recover at all for what he has done – 2 Mass 147. Esp 132. 253. 2 N R 61 n 1 T R 590. Ki L R 53. Stra 638.
It is upon this princ that if A agrees to labor for Stra 638. B for six months – & at the end of three months leaves witht the fault of B – A can recover nothing – 2 Pickering 2 Mass 147. Esp D. 132. 253. And this rule where the party leaves &c holds to be the same tho full performance was prevented by the act of God – because it is considered as a condition precedent 6 East 620.

In this action the pleader shd show in the declarn from whh the indebtedness arose – a genl allegan "that Deft being indebted &c undertook & promised" is not sufft – Esp 155 = Cro C 206. 1 Sid 182. Carth 276

129.

Assumpsit.

It is suffᵗ if the indebtedness is so alledge that it appears that it was not a specialty or record. Doug 276 - Bulst 91.
In alledging the undertaking, the word agreed is tantamount to promise - 2 W R 62.
The day laid in the declarⁿ as the time of the promise is not material - otherwise in written agreetˢ - Esp 135. 258. Stra 21. 806. 5 TR 620. 2 East 257 - Cro El 880. Chit Pl 258.

If the promise is laid on a day when the Defᵗ was actually under age - & the Defᵗ pleads infancy - the pltf may reply that he was of full age - & he may prove that it was on a subseqᵗ day that the promise was made & that the Defᵗ then of full age Stra 806 -

So where the cause of action is to arise upon request - the day of the request as laid in the declarⁿ is not material Esp 135. 258 Sidⁿ 68.

When the pltf declares on a special agreeᵗ - the agreeᵗ must be proved expressly as alledged Esp 138. 262. 5 East 107. 111. & 409. Ld Ray 735. 4 TR 314. Bull 145. 1 TR 447.

If the promᵉ is proved as laid - yet if it appears to be made upon a diffᵗ consideration from that stated - (the action will not lie) - pltf cant recover - So if he states the considⁿ correctly - but if there is another considⁿ connected with it - he cant recover - & viceversa Esp 140. 264. Cro El 79.

The place laid in the declarn is immaterial – because the action is transitory. 1 Lev 143. 11 Mod 348.
The declarn may be laid in one place & proved in another. (Difft in the case of specialties).

Pleadings on the part of the Deft.

The genl issue is non assumpt which puts in issue the whole declarn & under the genl issue the Deft may give in evidence any thing which goes to discharge or extinguish the debt but not that which goes to the discharge of the remedy – Stra 498. 4 Bac 601. 2 Bur 1010. 1 Chit Pl 470. 2 Ld Ray 566. 5 East 230. 4 Esp 181.

The Deft may also avail himself of the stat. of limitations but this defence must be specially pleaded for it is matter of L which goes not to the pltffs title; but to the remedy – or as it is expressed in the books to the discharge of the action. Esp 149. 279. 3 BosP 149. (n). 1 Saund 283 (n 2). Chit Bills 198. 5 Bur 2630. Cowp 548. Defence by Stat. of Limn
Tender – set off, & bankruptcy, on this principle are special pleas. these go merely to the remedy. but admit the debt. Esp 149. Tidd 575 – 5 Cranch 335.
And in Eng the stat of limn must be pleaded, tho from the declarn it appears that the cause of action is of more than six years standing – for the debt in contemptn of L is not discharged he may may therefore by not pleading the stat waive the stat – valentin 207-4. 1 Lev 110. Burr 2630. 2 Saund 63. (n a).

Another reason for the last rule is that there are savings to the stat & therefore the Deft must plead so that the pltff may reply over that the case is within the savings

By stat 21. Ja 1. c. 16. this action is barred unless brot within six years (same in N York) from the time of the cause of action accruing Esp 148. 282. In this state on verbal agreets – the action must be brot within three yrs after the right of action has accrued – negotiable N – 6 yrs –

Assumpsit

Stat. o' Lim. Where the stat has once begun to run no supervenient cause will stop its running. Esp 148. 282. Stra 55-6. Sal 845. 1 Wils 134. 4 TR 300. 1 John 165.
But the time is measured from the time when the right of action accrues & not from the time of making the cont.

All parol cont.s in general are within the Eng stat of lim. Hence bills of exchange, promissory notes & verbal agreem.ts &c Esp 148. 282. Sal 86. 1 Show 340.
If debt is brot for rent on a parol demise it is within the stat; if brot for rent reserved by deed it is not within the Eng stat. Sal 86-7. Hutton 109.
Neither does the stat extend to debt vs the shff for an escape, for this is not founded on any cont. express or implied; the foundation of the shffs liability is the breach of his duty. Sal 88. 1 Saund 35. Does not extend to debt on an award. 1 Saund 64.
In Conn we have a stat limiting the shffs liability to 2 years.

So it is said that the stat does not extend to debt vs shff for money collected on Ex.n. But it is said in Bul 93. &c. 2 Mod 246. that the rule is otherwise — but in the same cases it is said that an action on the case vs the shff for not bringing the money into Ct per quod &c will not be barred by the stat. Sal 91-2. 2 Mod 212 — (It is said that case will not lie) A debt barred can't be set off vs another debt. for as the debt will not support an action it will not bar one. Sal 79. 94. Stra 1271. Bul NP 180. Sel N.P. 139. Peak R 121.
But in the Eng stat there is an exception of such acts as concern the trade of merchandise between merch.ts & merch.ts & between their agents & factors — same except.n in N York. Sal 370. Esp 149. 283.... — (this was to encourage trade & merchandise — S N P) 2 John 200.

Stat. of limitⁿ

This exceptⁿ has been held to extend to cases of mutual open accts agreemts between persons not merchts. when there are items on both sides: & in such case one item of Cr within 6 years will take the whole of the other party's acct out of the stat — (secus in Conn. Sw. Di. 309. 1 Day. 245). Sel 70. 81-2. Bul N.P. 149. 6 D R 109. Nev 45 a. Watson L of Part 211

But if the persons are not merchts. ~~&~~ if the items are all on one side, the items of more than six yrs standing are not within the ~~stat~~ exception — Sel 70. 82. 6 D R 109.
But between merchts ~~&c~~ if the acct is merely open tho all on one side it is not within the stat. i.e. it is not within the exception: ib 81
But an acct stated is barred in six yrs even between merchts 2 Ves 400 or whoever are the parties — Sel 72-3. 76. 2 Saund 124. 1 Sidn 465. 2 Mod 312. 2 John 200.
It has been ruled in N York that the stat is a bar to an action brot on a judgt of a neighboring state (probably it wd now be holden diffly.) 5 John 132. (7 Cranch 481. 3 Wheat 234).
11 Johns 168. 19 do 162.
The actual issuing of the writ in Eng is regarded as the commencemt of the suit. & the true time of issuing the writ may be proved tho it varies from the fictitious time — (If the date as it is in is before the expiration of the time — but the time of its issuing is afterwards — Deft may shew it). Sel 118. 113. Burr 959. Cowp 454. 1 Sidn 52
But the commencemt of a suit is no bar unless proceeded with. Carth 232. Sel 147. 162. 3 Mass 883. Wils 257. 3 D R 662.
But by the Eng stat if a suit is commenced in time & obtains a judgt wh is reversed or a verdict wh is set aside only due course of L — the pltf one yr after such reversal &c may commence another action. — The delay is occasioned by the L — & not the fault of the party — 3 Lev 245 —
Quest. According to the Laws of Conn adm may represent the estate insolvent — commissioners are appointed — will the Death of Deft — & after six years have elapsed — & pltff takes ~~in~~, the suit acct of Cr & applying to the commissioner for paymt — can the stat be pleaded?
Vide Bul 158. Stra 907 — Esp

Assumpsit

Stat of Limit. There is also a saving of infts feme coverts, persons beyond seas & confined persons non compotes where the disability exists at the time of the accruing of the cause of action. in such cases they may respectively sue within 6 yrs after the disability is removed. in the sd. stat no other actions are mentioned except actions on the case for words. but the clause has been extended to assumpsit. Esp 149. 289. 2 Saund 121. Stra 836. Sal 5. 175: 181. 2 Mod 71.

But tho infts & the others like are protected by the stat, they are not prevented from suing during their disability. 2 Saund 117. (g). 120. 3 Wils 145: Sal 182. Esp 149–50. 284–5:

Where there are jt pltfs if any one of them are within seas when the action accrues, the absence of the others does not bring the case within the saving clause; for one has the power of bringing the suit for all. Esp 149. 289. 4 TR 516.

The saving clause just mentioned extends to foreigners residing abroad & all persons beyond seas & continues till they return into the realm. Esp 150. 3 Wils 145: 3 John 263.

Under 4 Ann & the stat of N Y, the return of the Deft takes the case from that time out of the saving clause & the stat then begins to run. Esp 285: –6. 1 John ca 76. 1 John R 165: 1 Wils 134. (& it continues to run tho he shd afterwards leave the realm) But the return of a debtor must be such as to enable the plff to sue. Esp 286. 3 Mass 271.

As to subseqt Acknowledgment vide

1 Ryl ca Ab 305: 12 Vin 192. 2 Bur 1099. Cowp 544. 2 TR 760. 4 East 603 (n) Peak 92. 2 H Bl 340. 1 Esp R 435. 3 Esp R 155: 4 ib 46. 4 East 598. 2 Campb 167. 6 TR 153: East 418. 4 John 461. 4 Mass 133. 10 John 35. 15 ib 511. 11 Mass 452. 4 Maule & Sel 457. 11 John 146. 5 Bin 576. 5 Day 223. 5 Maule & Sel 75. (3 Campb 32 – Hawes ©) 13 Com R 131. 170. 4 Com 338. 4 Campb 92. 2 Barn & Alder 759. 1 Da 693. 3 Taunt 380. 6 Esp R 68. 7 Taunt 608. 4 Barn & Alder 568. 1 Sergant & Rawl 199. (2 Com Con 572 & notes.)

*In the application of the stat. of limitn lex fori governs, for the stat relates to the remedy. 1 B&P 138. Chit. Bills 60.
On this prin. it was held in Penn. that where the plff resided in So Car. six yrs he was not within the saving clause of the stat of Penna. 2 Dall 218.

The stat does not extinguish the debt & a new promise may take the case out of the stat. if made within 6 yrs. Cal 188. Esp 157. 287-8. 2 Ventr 151. 2 Show 126. 2 B R 766. 2 Ld Ray 428. 1101
The rule formerly was otherwise, unless the new promise was upon new considn. 2 Ventr 152. Bul 188. Cal 188. now overruled.
Hence a devise charged with the payt of all the testators debts takes the case out of the stat.

Rule the same where there is a conditional promise, if the condition is performed, as "prove your debt & I will pay the debt &c 2. I will pay when able; if the plff proves the Dft to be of ability (vide same) &c 3. I will pay if you will give me time. Cal 189. Esp 152. 288. 5 Mod 426. 2 [illegible]

But a new promise to an Exr will not support the action on a plea of non assumpt infra sex an where the promise in the declarn is to the testator, for the promise is 1st out of the issue. & 2d the promise to the Exr is no renewal of the first promise - in order to make a new promise it must be made to the original party -- Quere - cant the Exr bring an action on this promise at all. E. 2 Ld Ray 1101. 3 East 409. Cal
But an acknowledgement of the debt within the time limited is evidence of a promise suffe to take the case out of the stat. Cal 190. 5 Mod 426. 3 Esp 155-7. 4 East 599. 604. 1 Esp R 437- 4 do 46. Peakes R 93. 1 do R 20.

*If a parol cont. be made in Connt both parties residing here & suit is barred in 3 yrs here - & is attempted to be enforced in the state of N. Y. it cant be barred within 6 yrs - 1 B & P 138 & a recovery may be had -

Stat of Limit. And it has been said that the slightest acknowledgements are sufft. As. "I am ready to acct but nothing is due to you." Ball. 92. Cowp. 548. Esp. 152. & 89. Bur 1099.

Also the same tho the acknowledgment is made after suit brot.

So an acknowlt to a third person is sufft as where it was made to the clerk of the pltfs Atty & this too tho the Deft said he "was discharged by bankruptcy & lapse of time. 4 East 599. Ball. 92.

From these cases & others ~~it~~ this genl prin may be extracted, where
Ball 92. there is an acknowlt of the debt within six yrs tho it
4 East 599. is accompanied with a refusal to pay, is evidence of
5 Maule & Sel 75. a new promise, & to take the case out of the stat.
2 Barn & Ald 477. (This was formerly) When the words of the Deft were, I acknowledge the debt, but more than 6 yrs have elapsed & I will not pay — it was ~~held~~ held that it was out of the stat. So too an offer to pay 2s per pound.

An acknowlt of the debt as subsisting is not per se a promise, but merely evidence of it. Therefore pltf to a plea of the stat replies an acknowlt Eo nomine, the repn is bad it shd be a new promise. 12 Mod 229. 5 Co 426. Ld Ray 421. Salk 9. 29. 223.

But to every other purpose an acknowlt is equivalent to a new promise.

Once held ~~that~~ an affidavit by Deft for leave to plead the stat stating that he had not been called upon within six yrs for payt of the debt, was proper to be left to the jury as an acknowlt. If this be true it ~~seems~~ converts the means of taking advantage of the stat as a waiver of it. Bal 135. 4 East 610. Esp 2 56.

Part payt within six yrs is an implied acknowlt.

The law on this subject in Eng & this country have lately undergone
5 Green 77. a radical change — now if Deft says I owe the debt but I will
5 Conn R not pay it — this does not take it out of the stat. — to take
480. the case out of the stat there must be a promise to pay — without
1 Peters 351. a refusal to pay it — 3 Bingham 329. 6 Taunton 210. 1 Barnwell & Cres 1st 244. 4 Bing 185. 3 do 2 Brown R 35. 9 Serg & Rawle 128. 14 do 95. — 15 Johns 511. 6 Conn R 96. 2 Pick 3

An acknowlt by part payt or otherwise by one of several jt debtors, is an acknowlt by all, for payt by one in legal effect payt by all. Ball 201. 3. Dacey 29. Whitcomb v. Whiting, Peak 203.) Rule the same tho the party paying is not a party to the suit 2 Day 305. 6 John 267. 1 Taunt 104. 2 Bing 506.

Where one of two jt & several promissors became bankrupt & the promissee within six yrs had recd a dividend this was holden sufft to take the case out of the stat.

So an acknowledgt after dissolution of partnership by one of the partners, takes the case out of the stat. Esp 289. 6 John 267. 3 Esp 155. 11 East 589. Chit 209. Peak Ca 16. 203.
The Ct in this country do not feel disposed to go so far in destroying the effect of the stat, as the Eng Cts do. The rule here & indeed in Eng, is that the acknowledgt must go to the acknowledgt of the debt as existing at the time. 1 Peters R 351.

The usual form of the plea of the stat, is, non assumpt or action non accrevit, infra sex annos. Ball 215-225. 1 Mod 71. Saunt. 191.
But where it appears that the cause of action must have after the promise, the plea must be actio non accrevit &c for the stat commences, not from makeing of the promise but from the accruing of the action. Esp 156. 294. 2 Salk 422. Ball 215-18. 1 Mod 89. 2 Ray 838.

And the rule is the same where the promise is to do a collateral thing) on request, for the cause of action accrues from the request. Rule the same where the right of action accrues from the performance of a condition precedent. Bull 151. Ball 216-18. 10 Mod 104. 206. Esp 156 Salk 442.

Stat. Limit. But where the right of action accrued at the time of the promise made, non assumpt infra &c is good. Eg. on a promise to pay money on demand or on request. Ball 218. Ball 157.

So in indeb. assumpt. founded on a promise implied from an existing debt, non assumpt. &c is good, for the cause of action accrues at the same time with the implied promise Esp. 954.

But the plea, actio non accrevit &c. is always proper & of course is regarded as the safest. Ball 218. Ibid 219. 2 Saund. 63 n. c.

This plea must conclude with a verificn for it is a special plea, & is tantamount to an affirmative allegation, that six yrs have elapsed since the pltff right of action has accrued the plea must be left open. Ball 229. 1 Saund. 283.

If the plea goes to the whole declarn & is ill as to a part of the demand it is so as to the whole. Eg promise to deliver such a deed on request & to pay $100. on another considn on demand & the plea is infra sex annos it is bad. Ball 225. 1 Lev. 48.

This plea must deny the promise within the same number of yrs as the stat prescribes. Hence non assumpt infra decem annos is bad; because you can traverse it only by an affirmative pregnant — but it is ill only on special demurrer. Ball 226-9. Ld Ray 1099. 6 East 354.

The deft in his plea may divide the time covered in the declarn by pleading the stat as to part — Eg. sued on two promises, or sued in false imprisont for a continued trespass — but to the rest either by the genl issue or some special matter. Ball 231. Salk 420.

Ld Ray 506 It is said that if the action be debt — Deft may plead the stat under
Salk 78. the genl issue — or may plead it specially. on [illegible] this rule
2 Saund 283 seems not to be well founded.
n 2.

The repn to this plea may be genl, affirming that the promise was made or that the action did accrue within six yrs; or it may be special, alledging that he took out his writ at such a time, wh was within 6 yrs &c - or it may be special by alledging some fact wh brings the case within the saving clause of the stat. Ball 179. - as coverture - infancy - &c - Ball 179. 201-2. 241. 1 Sa 100. 2 Selw 63. 3 TR 662 - 2 Saund 119(1) Wils 27.

The genl repn concludes to the country, because it takes issue on the plea, but the special repn concludes with a verifican; because it alledges new matter, & must be left open, that the Deft may answer the specialty. Ball 234-40 Bur 962.

It has been a ques whether in these cases in wh the pltff relies on a new promise, whether the pltff shd declare on the new promise or on the original cause of action, once decided in the circuit Ct in Connt that the action can be brot on either

In Eng. the original promise is probably the one counted upon: for 1st if the new promise were sued upon the declarn must always be a special one. but their form is genlly not special & 2d it seems to be impossible to count directly on a new promise specially - &c where the promise is implied from an acknowledgt or part payt - & 3d If pltf sues in Eng on the new promise, he must state specially the consideration of the new promise.

4th an acknowledgt to a third person is suff to take the case out of the stat & here clearly the original promt must be counted upon. & 5th an acknowledgt after suit brot is suff & of course here the new promise cant be counted on. & lastly the stat does not destroy the debt.

Assumpsit.

Stat. of Lim. &c In com. the suit must be brot on the original promise 3 Comn.

By Stat 21. Ja 1. detinue, actions on the case, except for slander - replevin - account &c must be brot within six yrs from the accruing of the action.—
Assault & Battery, & false imprisonment 4 yrs.
Slander is limited to 2 yrs. Ball. 3.
No limitations to specialties - seems in Comn.
Entry on Lands limited to 20 yrs.
Actions of trespass to be brot within 3 yrs in Conn — in Eng 6 yrs

Accord &c

By accord is meant agreet.; by satisfaction is meant the execution of the accord — & accord & satisfaction mean a substitution executed & thus entirely discharges the debt — & is a good defence in assumpt. Esp. 147. (279.) Chit. Bills 98. 2 Ray 153. 1 Pow. Co. 457. 7 Mod. 144. 1 Selw. 135. 3 B. 15.

'Tis doubtful whether this plea can be given in evidence under the genl. issue, S.G. thinks it may be for it discharges the debt — because the plea whh goes to shew that debt is discharged — is good plea — 2 Ray 556. 1 Chit. Pl. 472 — Com. D. Accord. 5 East 230.

But an accord not executed is no discharge of this or of any other action, for this is a bare agreet. Esp. 147. Sel. N.P. 135 — 9 Co. 79(b).

This rule however in the case of simple contracts must suppose a right of action accrued before the agreet. for before such right of action accrued a simple contt. may be waived by parol. & another substituted in its place. Com. D. Pl. 2(G) 13. Cro. Ch. 383-4. 1 Sel. 135-6. 1 Mod. 262 — 2 Do. 44.

The defence of Accord & Satn. is pleadable to all simple contracts & in genl. to all personal actions for damages. 6 Co. 44. Cro. J. 100.

But to make the defence effectual the accord must be actually performed. 9 Co. 79. Cro. El. 304. 1 Sel. 135. Esp. D. 230. (2d pt. 67)

So if the accord in part executed, & the residue is even tendered, it is no discharge of the action. Esp. 230. Cro. El. 304. 9 Co. 79.(b) 1 Sel. 135. 2 JR 24. Esp. 147. 2 Do. 2 H. Bl. 317. 3 East 257.

A new executory contt. can't be pleaded in satisfaction of a former contt. of the same kind, unless it appears that the new contt. is in some respects better for the plff. than the former one. E.g. hastening the day of payt., or altering the place of payt. Hob. 68. Cro. El. 727. Esp. D. 230. For one executory contt. unless better can in no sense be a satisfaction. 9 Co. 79. — (would be one promise made & given for another)

Accord & satisn. But in those cases where there two contracts for the same debt by the same person, a recovery in one cont is a bar to an action on the other.

The satisfacn must appear to have been of some value in L. Eg Release of an equity of redemption, is no satisfacn for a legal demand(1) — (J. G. doubts this example at present.) Esp. 230. Littleton Sec 332 - 2 Wils 86. — (J. W. H. contra to the last authorities)
The satisfacn pleaded under an accord must not appear on the face of it unreasonable. Eg where the cont is for $.50. & the defence is $.5 pd under an accord in satisfacn, same if $49. This rule supposes the sum pd at the same time at which the larger sum became due, $ 50 due tomorrow may be satisfied by payt of $5 today. Esp 230. 1 Sel 136-7. 3 Co 117. Stra 426. 2 East 232 - 5 Do 232.
This rule extends only to cases in which the insufficiency of the satisfaction is self evident. Eg a pepper corn is a good satisfacn for $.100. It is therefore a rule that the Ct will not inquire into the value of the satisfacn. Hence the delivery of any thing of a difft kind from the thing contracted for is good satisfacn 3 Co 117. 9 Co 79. Esp D. 230.

So too any one specific chattle may be a good satisfacn for a cont for any other chattle. for it is not self evident as matter of L. that one chattle is worth more than another. Esp 230. 3 Co 117. 9 Co 79.
Payt of a smaller sum of money in satisfacn of a larger is good if pd before the larger sum became due, or if a difft place of payt was selected. The burden of proof lies on the Deft to show the unreasonableness. & he can show the insufficiency only by self evident proof from the face of the record. Esp 230. 3 Co 117. 4 Mod 88. 1 Lev 81. or 31.

Accord & Satn

It is said that nothing can be pleaded in satisfacn of a bond; but you may plead money &c pd in satisfacn of money due on the bond, i.e. money due by the condition of the bond. 2 Wils 86. 6 Co 43. 5 Co. 117(b). Pow. C. 426. Yelv 192. Cro J 254. 650. 4 Bac 87. (This rule affects the form only)

It is said in the last case that accord & satisfacn must take place before the breach of the bond. After breach nothing short of an acquittance by deed will answer. Cro El 193. 46. 7 East 148. (C.W.H. thinks the rule unreasonable)

To an action on a parol contr. a parol accord executed is a good defence. but to a bond a parol accord is not suffic, the accord must be by deed. 2 Wils 87. 376. 6 Co 43.

Again it is held that to a deed for any thing except money accord & satisfacn can in no way be pleaded. (T.G. thinks there is no reason in this rule.) 9 Co 79.(b).

The plea of Acc & Sat must allege that the Deft pd or deld &c so much &c in full satisfaction, & that the pltf accepted it as such. Stra 23. 3 East 251. Stra 573. Esp Di 229. 2 [illegible])

But the safer mode is not to state the particulars of the accord at all, but merely to allege that the deft &c & that the pltf recd ut supra. For then the Defts is not tied down to the proof of a particular agreemt. 9 Co 80. 1 Bac 25. Stra 573. (This is called pleading by satisfn merely)

The breach of a mere accord on either side is no cause of action, an accord is of no force whatever in law until executed. 2 H Bl 317. 1 Ray 122. 1 Selw 137. 5 East 237. 1 Roll 129.

This rule may undoubtedly do great injustice. Eg Credr agrees to receive timber & it is prepared by the debtor & the credr refuses to accept. T.G. thinks in a strong case a Ct of equity wd interfere.

Accord & Satisfn – Accd & Satisn will never support a plea of performance or payt. 1 Root 95: Payt is a thing entirely diffnt from accord & satisfacn on the other hand under plea of payt accord is not suffnt.

Acceptance by the pltf of a satisfaction from a third person is no defence, but this supposes the third person not to be an agent for the Deft. Esp 147. 281. Cro El 541. 6 John 97.
The rule applies to such a case as this. A. purchases of B. a bond v C. & A sues C. in B's name. now C. can't plead that A. has pd the bond to B. Cro El 541. Esp D. 147. (280-1). 6 John 97.

Payt – Payment may be given in evidence under the genl issue or may be pleaded specially. 1 Ray 217. 566. 787. 88-9. 2 Bur 1010. 1 Sel 146. 1 Chit Pl 491-2. 496. Esp D. 147. (280)
Part payt is no plea. it is merely evidence, in mitigation of damages. if Deft pleads part payt pltf may demur, if Deft has pd part he must suffer default & pray to be heard in damages. If he pleads part payt. & the pltf demurs. the pltf will have judgt for his whole demand. Esp Di 147. (280).
Payt of the whole princl due, if accepted by the pltf, is a good plea, to an action afterwards brot for the interest. 5 John 271. 3 do 229.
If the vendor of goods takes notes or bills of exchange for them & the notes & bills prove not to be good, tho genuine, the securities are no payt unless the vendor agrees to take the risk & to receive them as payt. for the bills &c are regarded merely as the means of obtaining payt. 7 TR 64. 184. 12 Mod 203. 408. 517. 6 TR 52. 5 Do 513. Salk 124. Chit B. 122. 154. 1 Esp 3. 1 Selw 277. 8 TR 451. 3 East 147. 257.
And if a Cred. is induced by fraud to accept a note as payt & expressly agrees to assume the risk. yet the note is no payt. (& the vendor may sue for the goods taking no notice of the Notes &c – 1 Esp R 430. 2 Do 522. Com. Con 38. 6 John 110. 3 Camp 352 contra.)

At c.l. to debt on bond payt after the day is no defence, for the condition is broken. but now by stat. 5 Ann. payt after the day is good. Esp D (225:) (2 pt 61). Payt

If an obligation is payable on a day certain, the Deft shd not plead payt before the day. for the issue if found for the pltf wd be immaterial. he shd plead payt on the day. & payt before the day will support the plea. 2 Stra 994. 2 Bur 944. 1 Bl R 218. 2 Saund 319. 2 Wils 150. 173. Bul N.P. 174. Esp D (225: (2 pt 62)

If money is payable by cont. on or before a certain. Dept may plead payt before the day. still if the pltf were to traverse payt before the day the issue wd be immaterial) the pltf must therefore in ~~his traverse~~ reply that the payt was not made on or before or after the day. This is an anomalous mode of traverse for it goes beyond the allegatn of the pltf wh. Deft is in no other case obliged to do. (Ib). 2 Bur 944. 2 Wils 174.

When payt is pleaded after the day it must be pleaded as of the whole amount then due — i.e. print & interest. Esp D (2 pt 63) Bul 171.

If there are several debts due from one person to one & the same Creditor — the debtor may elect to wh. he will apply the payt — but if he makes a genl payt — the Cr may elect to wh. to apply it. 2 Stra 1194. Cro El 68. 2 P. Wms 308. 1 Ver 607. 1 Sal 146.-7 Esp D (2 pt 65).

In Equity however if a debtor makes a genl payt it will be applied to a debt wh. draws interest. this is founded on the presumed intention of the debtor. 1 Ver 24. Esp D (228: 2 pt 65) J. G. thinks that strict justice would require the rule to be the otherway.

145.

Assumpsit.

Payt. (debt on bond by Eng. L. there is no limitn by stat; but where a bond has lain dormant 20 yrs the jury are directed to presume payt. By our stat law debt on bond must be sued within 17 yrs. – vide Title Evidence)

Coverture Coverture – may be given in evidence under the genl issue non assumpt – or pleaded specially – for coverture does not amt to the genl issue for it admits the declaration – vide Hus. & Wife – 1 Selw 134-5. 12 Mod 101.

Infancy. Infancy is in genl a good plea to all actions brot vs infants on contt 2 Lev 144. 1 Selw 138. – Parent & Child –

Bankruptcy. Bankruptcy of the pltf is pleadable in bar, where the debt was due before bankruptcy – not if it was afterwards – Bul N.P. 152. Cook B.L. 459. 1 Ld R 472. 7 T.R. 396. Lawes 713. Esp D. 156-7.

So bankruptcy of Deft may be pleaded in bar, if he has obtained his certificate, if the debt might have been proved under the commission – but if the debt was subsequent secus – 1 H B 599. 3 Wils 262 – 2 B&P. 764. This defence is founded on the Eng stat of ~~[illegible]~~ Bankruptcy – Esp 157.

In this case however the debt still remains due in conscience & therefore the debt is a good considn to support a new promise. Cowp 544. Doug 182. 378. 501. Esp D 158. 2 T.R 765. 2 H B. 116. 7 John 36.

Bankruptcy of pltf or Deft must be specially pleaded. Saund 283. (n 2). Chit on Bills 198.

There are at present no Bankrupt Laws of the United States – (W.H.) Congress has the only authority to establish bankrupt laws – T.G.

Assumpsit.

It has been agreed how far our special bankrupt laws
be are constitutional 6 Hall L. Journal 547. 4 Wheaton 122.
*But it is now settled that these local bankrupt laws are
good so far as they discharge the person of the debtor, but not
good so far as they discharge the debtors prop. for to exempt
the prop is to discharge the debt — But exempting the per^n
merely regards the remedy. Con^t U. State Art 1. Sec 8. 5 Halls
Law ~~[illegible]~~ Journal 602. Golding v Price. 13 Mass 1. 4 Wheaton 209. 6 Do 131.
Such an act therefore can operate only as the lex fori in
other cases. 3 Conn 253. 304. 472 — 523. 12 Wheaton 213. 2 East 455.
Thus A in N.Y. owes B in Conn. & obtains a discharge by the L of N.Y. & a 3 Conn 523
suit is commenced vs him in Conn. the discharge will not avail 4 Do 47. 49.
him — 6 Conn 480.

In assumpsit & in debt on simple cont^t release may be **Release**
given in evidence under the gen^l issue, or pleaded specially.
2 Bur 1011. 3 Do 1353. 1 Ld Ray 556. 789.
The rep^n denying this plea is non est factum. 1 Sel 147.
ie when denying the special plea.
A release must always be pleaded as being by deed for a
release must be by deed, or it is not strictly a release.
& a mere verbal discharge, will not discharge the cont^t
after a right of action has accrued, 2 Wils 376. Esp D (107)(308)

A release of all demands will not discharge a duty
afterwards accruing, for demands means existing
demands, Bul N.P. 166. (vide Title Cov^t Broken — Esp D 307-8.
Sal. 2 171. Cro B. 83. 1 Ld Ray 515. Cro J 99.
A release therefore of all demands by the holder of a bill of exchange to the drawer
before acceptance or refusal of acceptance, will not discharge
the bill, nor the drawer, but if after refusal to accept
or after non payt — a release of all demands discharges
the drawer. 1 Ld Ray 65. Esp D 308.
* See Kents Commentaries on the subject.

Assumpsit.

A release given after suit brot may be good to discharge the suit. 1 Sel 144.-8. Yelv 141. Bul N.P. 309. 3 T R 186. 4 East 507.
If the release is given after a continuance of the action. – the Deft sh^d^ plead that it was given after continuance &c –

Another defence is that the Deft has given to the pltff a bond for the same debt, for the bond merges the simple cont^t^ & the action must be brot on the bond 1 Burr 9. Esp D. 144. 169. (281). Chit Bills 185. 62. 2 Chit Pl 434. Bul 155: 3 Camp 257. Cowp 120. May be given in evidence under the gen^l^ issue or plead specially.

Bond & Judg^t^ But a bond given for a simple cont^t^ debt by a stranger does not merge the simple cont^t^ for the bond is here merely a security. 1 Pow Con 423. 6 T R 176. Esp D. 190.

This defence may be given in evidence under the gen^l^ issue for extinguishes the debt.

A former judg^t^ by either party for the same cause is a good defence. If the pltff recovered in the former action, the cont^t^ is merged in the judg^t^ – If in the first action judg^t^ was for the deft on the merits or on demurrer the judg^t^ is an estoppel. Peak E. 34.5: Bul 252. 6 Co. Cro El 664. 7 T R 269. 2 H R 427. 1 Chit Pl. 170-3.

But a former recovery on any collateral ground is no bar, Eg. If A has recovered vs B. for a fraud in recommending C as worthy of credit when he was not, this does not prevent A from recovering vs C. on the contract which the fraud procured, for the two actions are not for the same thing. 3 Esp R 208. 1 Day 22. Bul 67. Peak R 124. Peak E. 172.

Judg^t^ & Award of Arbitrators. An award of arbitrators deciding the same cause is a good defence. while in force it is the same as a judg^t^ (7). 1 Chit Pl. 170-3.

Former judg^t^ & award of arbitrators may be given in evidence under the gen^l^ issue.

Aſsumpsit.

Tender & bringing money into Court.

Tender, & bringing money into Ct, must be specially pleaded. it merely defines the Pltf's rts & gives them to the Deft. it does not discharge the debt. Saund 283.(n 2) Chitt. 98.

Tender is an offer to pay a debt or perform (a duty). 5 Bac 1.

In some cases where tender wd be of no avail. money is brot into Ct which substantially answers the purpose of tender. This bringing money into Ct is adopted when tender has been omitted or when in certain case the plea of tender wd be ineffectual. this proceeding is distinct from that of bringing money into Ct under plea of tender. It is brot in under the genl issue & under leave of Ct. 5 Bac 1. Tender H.) Stra 781.

Leave of Ct is, sometimes granted by virtue of a positive stat L. but in genl it is brot into Ct by virtue of the discretionary) power of the Ct under a rule of practice called the common rule. 5 Bac 1. Com Di pl. 2. W. 28).

The effect of bringing) money into Ct under the com. rule is sometimes, to put an end to the action.

But more commonly the effect is, that the money deposited is struck out of the declaⁿ, so that the pltf cant claim that money in evidence. he can only go for what he claims more than is brot into the Ct. Bac Ab. tend. N.

In genl money may be brot into Ct in all cases in wh. tender wd be a good defence 5. Bac 26.

But in com. bringing money into Ct except under plea of tender is unknown; for here it is unnecessary; here tender'd after day of payt is as effectual as tender before the day or on the day of payt - tender here is good after suit commenced if it includes costs.

Tender. The party makeing tender must make known that he offers the money in discharge of some debt or duty. Latch 70. 1 Selw 174. 2 Wils 74.

Merely declareing ones readiness to pay a debt is in genl not enough; it is no tender, if then the Deft came to the pltf with the money, & declares his readiness; it is not suffi, he must by action tender or offer it. Bac Ab tend B. 1. 1 Leon 71. 2 Lev 209. 3 Do. 104. 12 Mod 353.

But an actual offer of money in a bag or box is suffi; the debtor need not count out the money to the creditor. Bac Ab. tend B. 1. 5 Co 115. Co Lit 208. 1 Stra 777. 3 T R 684. Esp Di 380.

In case of several debts between the same parties the debtor may apply his tender to which of them he pleases. Bac Ab. ten B. 1.

A tender of more than is due has been held good & the credr is bound to make the return, but the rule is that such tender is good where the Ct does not object on the ground of its being too much. Peak Ca 258. Peak R 88. 179. 1 Selw 171-2. (2 Stra 916. 5 Co)

If a person is bound to do one of two things at the election of the Credr the tender to be effectual must be of both, so that the Cr may make the election. Bac Ab ten B. 2. 1 Leon 68.

A tender of any kind of money made current by law is good, Eg. foreign coin - (since except. of foreign coin by the New Law) Latch 84. Salk 446. Com 384. Esp D. 16. 130.

But by Constn of U.S. no state Legislature can make any thing than gold & silver coin a tender. Art 1 Sec 10. **Tender.**

By the L of the U.S. copper cents are a tender. it has been questioned whether a tender of copper cents of any thing more than the fractional part of a dollar is good. G. thinks it is a good tender to any amt, the cents are as much the current coin of the U.S. as Eagles or dollars. But why shd the sum be fixed at a dollar if the princ. is correct it shd be fixed at five cents.

But a tender in Bank notes is good unless objected to at the time on that ground. 3 T.R. 554. Peak Ca 258. 2 B&P 526. 1 Esp ca 218. Chitty on B 172. Esp D 161 (3 Ed). Bac. Ab. tend (C. 2).

It is held in Eng that tender of counterfeit coin if accepted by the cr. is good, provided there is no fraud. the supposed, is really that if payt be the Cts regard this case as the case of the sale of an unsound chattle, witht fraud & witht warranty. Bac Ab. ten. B. 2. 5 Co 115. Co Lit 208. 1 Show 344.
In Mass. payt in forged bank notes was held not to be good. 6 Mass 182.
In N York the same rule. 2 John R 455.
The Cts in these cases consider the bank notes as mere securities for debt & not as money.
Where payt is made in counterfeit bills of exchange or prom notes the payt is not good. 1 Esp R 3. 7 T R 64. 2 Caines 117. 2 John 68. 5 T R 513. 6 Do 52. 7 Do 66.

In Connt the subject is regulated by Statute.

Assumpsit

Tender. The actual tender may be dispensed with: as for: Eg. on offer by debtor to tender a certain sum, & the cr demands more, this is regarded as dispensing with the production of the money. Peak R. 88. Peak Ev. 157. 4 Esp R. 67. Esp D. 161. (3 Ed).

A conditional tender is not good. Eg. on condn that you give me a recpt, for in E the cr can't be compelled to give a recpt. Peak R 177. Esp D. 161. (3 Ed). 2 H Bl. 31. Chit. B. 157. It wd seem from some expressions that it was necessary that the cr. shd give a recpt when required. 1 Camp 477.-8. but J.G. does not think this true. Esp D. 161. (3 Ed). 1 Cam 478. But the tender is good if the condn be that the cr deliver up the note &c Chit. B 158. 2 Camp 296.
Tender to a person authorised to receive payt is good. 1 Selw 193. 1 Camp 477.-8.

If tender is made of only part of an entire debt, the Cr only loses interest on that part. it does not bar the action. 1 Camp 184 (n). Esp D 161. (3 Ed).

Where a place of payt is named in the contt the tender must be made at that place Bac Ab. tend (C.) Co Lit 210.

Where the cont is for the payt of money in gross & no place of payt appointed, tender must regularly be made to the person - unless out of the state &c (Id) Lit Sec 340.
- When the Cr is out of the state in such case, what must be done -? Wd it be suffict to aver readiness &c. & that Cr was out of the State. J.G. thinks it will.
Suppose he tender at the house of the plff -? this is useless & why at the plffs house - 5 Bac Abr- tend (G) (9) Co Lit 210. 1 Chan Ca 29. — Bac Ab tend (h) 1 Sidn 30. Dawson Mod 457.

Tender.

Of rent issuing out of the land, tender may be made to the person of the Cr. or on the Land. the reason is that originally rent was payable in the produce & the landlord was bound to take the crop from the land.—(If no place is named).
Bac Ab. tend (C.) Co Lit 210. Cro El 48.

Where bulky articles are to be tendered & no place appointed, the Dr is not bound to tender to the person. & the Cr is not bound at all times to recieve the tender. (Id).
The party bound shd require the Cr to appoint a place, & a deliv at that place is good. If the Cr refuse to show a place the debtor may appoint a place & give notice to the Cr. & deliv it there.—(Id)

When tender must be made to be good—

After action brot tender is not good for it is now too late to defeat the pltfs right to costs, the pltf has attached in himself a right to costs, This rule can opperate only where money is payable on demand, for where it is payable at a certain time, it must be made at that time. 1 Sel 73. & 3 R C 629
1 B&P 391.
In Equity a tender of debt & costs is good pending a bill, & this is the rule in this State at L. Bac Ab tend (D). Bunbury 28

If money is payable on a certain day tender before the day is not good. & the Cr is not bound to accept.
But where money is payable on or before a given day, tender before the day is good. Bac Ab D. 12 Mod 530-3. 5 Co 114.
Cro El 14 Bul 171-4. Stra 994. 2 Bur 944
If money is to be pd or goods delivd at a place certain, on or before &c— a tender at that place is not good except on the the last day mentioned, unless the Cr is present at that place, the day is not fixed & the Cr is not bound to be present all the time &c— Bac Ab. tend. (A). 5 Co 114. Co L 211. Cro El 14. Com Di—condn (9) 8-9. Plow 172-3. 12 Mod 421.

But if the Cr is not present on the last day a tender at that time & place on the last day named, but it must be made at the uttermost convenient time of the day, by wh is meant the latest period of the day whh will allow the business to be transacted before sun set. 5 Co 114. Co Lit 202-11. 2 com R 69. 5 Bac tend (D) Plow 173. 3 Lev 104. Stra 777. Salk 624.

But if the parties meet before the latter part of the day a valid tender may then be made (Id)

And in the first case where it appears that the plff was absent, the debtor must alledge that the tender was made at the uttermost convenient time of the day.

But in the case of inland bills of exchange & promissory notes the debtor is allowed the whole day for payt

If circumstances beyond the control of the parties payt or tender can't be made at the late part of the day, payt or tender may be made at the latest time of the day in whh it can be made — Eg in transfer of stock tender may be made at the latest convenient time of the hours of business. 12 Mod 531. Salk 624. Stra 777. Raym 988. 5 Bac. tend D.

Suppose a place appointed & no time of payt. in this case the debtor on giving notice of a time future, & tender at that time in absence of the Cr is good. Bac Ab tend D. Co Lit 211. Dyer 354.

But in this last case if the cont is to pay money, the debtor on meeting the Cr at that place, may always make a valid tender for the Cr is presumed to be always prepared to receive money. Bac. ten D. Co Lit 212 — 5 Co 114. Cro El 14.

If neither time nor place is fixed & the Cr is absent, but not out of the realm what w^d be a good tender?

In Equity if the debtor fixes a reasonable time & place, & a tender according to appointment will be good. 2 P. Wms 378 Bac Ab. tend. (g) (a). 12 Mod 422.
Probably the same rule w^d be adopted at Law. 5 Co 92. Free^m 433.

If the articles are numberous & neither time or app^d the party bound must request the other to appoint time & place, & a tender in pursuance to the app^mt will be good.

But if Cr refuses to appoint time & place, the debtor must app^t reasonable time & place when he may make a valid tender in the absence of the Cr.

In gen^l tender of money discharges not the debt, but the nominal damages for detention & costs. Law, N.P. 174-5. 3 Bl. 303. Peake Ca 258. 1 Lev 209. Carth 133. Com D. Pl. 2. w 28.

Consequences of Tender

Where with^t any preceding debt or duty, one makes a grant in nature of a mortgage, to secure a mere gift, tender according to the condition, discharges the whole claim, for from the nature of the case it discharges the lien, & there is no debt independent of the lien
5 Bac tend. (f) Co Lit 207. 9. a) Pow Mort 654. ~~Co~~ Lit Sec 338. 10 Co 77.
Such w^d not be the case if the mortgage had been to secure a debt,
The Cr's right to costs may be revived by a subsequent demand of the money, & the refusal of the debtor to pay. the subseq^t demand & refusal destroys the tender.
5 B. Ab. ten. (f) ~~Hob~~ 207.

Aſsumpsit

Where Deft prevails in a plea of tender & the money is taken by Pltf. the deft is entitled to costs. for the tender discharges the action

But it is not neceſsary for the pltf to take the money. to entitle the Deft to costs, for the deft prevails in the suit. Bac Ab tend (F).

But where one is bound to pay cumberous articles a tender duly made, discharges the whole duty, not only the action but the oblign. Eg load of hay. or merchandise genlly. the debtor may leave the merchandise where he was bound to tender it. & have no more care with it Bac Ab H) 9 Co 79. Co Lit 207. 2 Roll 524.

This rule has been supposed in Conn to extend to all specific articles. but J.G. thinks this incorrect. Eg Gold watch _ Diamond Ring _ { 1 Root 55 - 64. 198.

When Tender is a good **Defence** In genl tender is a good defence in all cases. in whh the debt or thing contracted for is certain or whh can be ascertained by computation. Eg in Debt covt or assumpt. for a sum certain. & in an action for the non delivery of ascertained specific articles. but in case of common due bills tender can be no defence Bac Ab (O) p.

But this is not universal. Eg where is not due before action brot, tho the sum be certain, tender is no defence Eg. penalty for breach of stat. In this case however money may be brot into Ct under the common rule Stra 1217. Bac Ab (O)

But in all cases in whh tender wd have been a good plea. money may be brot into Ct. if tender has not been made.

When Tender is a good **Defence.**

In assumpt for uncertain damages, then tender is no defence, for what ought to be tendered cant be ascertained except by finding of a jury &c, the pltf is not bound to receive any sum. he may insist that the sum is not large enough. but if the damages are agreed upon by the parties, then the sum is ascertained & tender may be good. Stra 4&7. 11 Mod 270. Salk 596. Bac Ab. tend. (O). (K) 2 Bur 1112.

But in Indeb. ass: tender is always a good plea. for if the sum is not ascertained or capable of ascertainment the action cant be indeb. ass. Salk 23. 597. 6 Mod 128. Bac Ab. tend (K).

In debt on covt for rent tender is a good plea. Salk 596.

It was formerly held that tender was not a good plea or defence in indeb. ass on quantum meruit, or valebat. 1 Ray 258. 12 Mod 187. but in genl is seems that now it is a good defence in such cases. Stra 576.

But where the damages cant be ascertained witht judgt of jury &c, tender is no defence 2 Bur 1120. Bac Ab. tend. (K) Eg Bond of indemnity 12 Mod 598. 5 Bac. tend. (K)

Tender of sufft amends is a good plea in replevin in case of cattle taken damage feazant, but the damages are here uncertain & if the jury find more damages than the tender the defence will not avail.

This rule is allowed because the injury is supposed to be involuntary. 2 Chit P 521. 3 Bac 81-2. 5 Co 76.

And by Stat 21. Ja 1. tender of sufft amends before action brot is a good defence in cases of involuntary trespass.

(21 Geo. 2) 2 Chit P 521. 2. Bac Ab. tend. (K) 3 Lev 37.

It seems doubtful whether this stat extends to any involuntary trespass, except such as is done by cattle.

Indeed the object of the stat, seems to have been to allow this defence in such cases of trespass in wh it was allowed at CL in the action of replevin.

In trover for money converted, the sum may be brot into Ct under the com rule, but in trespass the sum cant be brot into Ct, for the damages in trespass are presumptive, the pltf has damages for the vi et armis. but in trover the value of the prop is always the rule of damages. Bac Ab tend(p) Stra 142.

Can't tender be pleaded in an action of trover for money converted. J.G. thinks not. at CL there only one exception to the rule, that for tort tender is no defence, & this exception is that of replevin.

In the Eng Ct of C Pleas, the deft has been allowed after a rule to show cause to the contrary, to bring ~~money~~ prop into Ct, in an action of trover, for such prop. but not so in B.R. Bac Ab tend (p. 2 Barnes 220-9.

Mode of Pleading Tender. Evry requisite to a valid tender must be alledged in a plea of tender, Salk 624. Bac Ab. tend (h)
Thus ~~pltf~~ deft must alledge that tender was made at the uttermost convenient time of the day. when the pltf was absent,
The genl form is thus, for the space of an hour next before & until the setting of the sun &c he offered then & there &c 1 Lil Entries 164. Cro James 13. 423. Sal 623. Stra 771. 3 T.R. E. & D. 160. or 299.

If the pltf was present at the time of the tender, it is not sufft to alledge that the Deft was ready. Bac Ab. tend. (H-1) 3 Lev 104. 2 Do 209. 2 Wils 79. Ey. Di 159. (298).

But if the Cr is absent at the time & place, a formal tender is not necessary. so far as the act to be done is concerned it is sufft to alledge readiness. Stra $\overset{542}{458}$. Doug 661. 2 Ray 986. 1 East 203. Salk 622-3. 1 Selw 173-4.
So too where on the time appointed the Cr is dead, & no legal representative is appd — readiness is sufft.
2 Show. 143. 5 Bac 16. 2
And where the Cr waives an actual tender, allegt of tender is not necessary — allegtn of readiness is sufft.
Doug 662. 1 Roll 458. 1 Selw 172 (n) Peake's R 88.

If it does not then appear that the Cr was absent at the time, the Deft must alledge not only a tender but a refusal by the Cr. & the Cr is always deemed to be present, unless it appears in the plea that he was not present. If refusal is not alledged, it might be that Deft made a tender & instantly retracted it — but it has been held that omission of refusal is cured by verdict. 2 Lev 23. 2 Saund 352. 1 Vent 109. Salk 623. 2 Ray 687. 964. Ey. Di 160. (299).

As to the mode of praying judgt on this plea vide 9 Co 79. Co Lit 209. 5 Bac 15. Salk 623. 2 Ray 254. Cro J 755. Cart. 143.

The genl issue & tender cant be both pleaded to the whole declarn or to the same part of it. 2 Barnes notes 291-6. 5 Bac 16. 1 Ch 541. (n) 4 T R 194.
The reason is that these two pleas require difft results in respect to the judgt to be rendered, the genl issue goes to the discharge of the debt, tender goes only to the costs.

Aſsumpſit

Mode of Pleading Tender.

When the duty is paym^t of money it is in gen^l not enough to plead tender & refusal when the plea does not discharge the indebtedneſs but merely goes to the costs, the Deft must always alledge that he always was ready & always has been ready since the tender & that he brings money into Ct. But when tender destroys the obligation it is suff^t to alledge tender & refusal witht readineſs
1 Show 129. 2 Roll 523.

Sometimes the deft must plead tout temps prist & sometimes it may be omitted. If the contract was to pay on demand the deft must plead tout temps prist besides tender & refusal & still ready & brings money into Ct. for in this case unleſs he pleads always ready it is that witht such allegan his plea is consistent with the fact that the pltf demanded & the deft refused. 5 Rep 168 Salk 254. 622. Esp D 159. (2 78). 1 Selw 173-4. Ld Ray 254. Carth 413.

In all cases in indeb ass: the deft must always plead tout temps &c

In cases in wh deft pleads witht a tout temps prist the pltf may reply that the pltf demanded & the deft refused, before the tender, for after refusal the pltf is not bound to accept tender, the deft is fixed. 1 Ld Ray 254.

Or the pltf may reply demand & refusal subseqt to the tender, for the demand & refusal does entirely avoid the effect of the tender, when the money was payable at future time ib. 254.
But if money was payable at a particular time the deft may plead that he has been ready since the tender that he tendered on the day appointed &c. he need not plead her
Co Lit 207. Salk 622. Ld Ray 254. Sid 30.

But here also the plt may reply a subseqt demand & refusal, for the deft after tender must always be ready. it has been supposed that he must keep the identical money tendered, but L.G. thinks this is not necessary it is sufft if the Deft be ready.

Where the contt is to deliver cumbrous articles it is not necessary to plead a readiness after tender & much less to allege a profert in Ct. it is sufft merely to allege tender & refusal; & this is a perpetual bar & discharges the whole obligation. 9 Co 79. Co Lit 207.

It is said indeed in the books that the plea must allege that by reason of the weight, the article cant be brot into Ct. but L.G. thinks this unnecessary, for the Ct must know judicially from the description in the contt that it is to heavy to be brot into Ct. (2 Roll. 524. Bac Ab. tend (H4)

But in case of money a profert is necessary & the money must actually be brot into Ct, or the plea is void & the plt may sign judgt as for want of a plea. 12 Mod 354. Stra 638. 2 Ld Ray Bac Ab tend (H4)

It is laid down in our older books that in an action on a penal bond if the deft pleads tender with an uncore prist & a profert & the plt traverses the tender & it is found for the deft, the deft may take back his money. Co Lit 207(a) Bac Ab. tend. (I) 1 Salk 599.
For the L intends to punish the plt for false pleading & by endeavouring by false pleading to subject the deft to a penalty. But the rule is now abolished the reason has ceased since penalties are not now recovered in Cts of Law. Saund 33 n 2 TR 645. 1 B&P 332. 4 Mass 261.

Assumpsit.

consequence of a tender of cumbrous Articles.

In a cont for the delivery of cumbrous articles on a tender & refusal regularly made, some hold that the prop vests directly in the Cr, the debt. is settled, is discharged, but G. thinks that as long as he refuses his prop the dept can't force it upon him — volens volens. 1 Swift 294
others hold that the cr looses both debt & prop — Chipman Essays 127). (This last rule little too strong)
Again it is held that the dr must keep the prop for the Cr. 1 Swift ib — (this is also bad).

Suppose that the Cr refuses or is absent at the place & time when the tender is made — here the dr may leave the prop to its fate — & his obligation is discharged forever — or he may constitute himself a keeper — or he may waive the tender & use it as his own — G. opinion (vide 1 Sw 294 n)

If the dr keeps the prop merely to preserve it, it wd be equitable for him to deliver it up on demand — but the Cr can't maintain trover — because the title never vested in the Cr —
If the Cr will then sue upon the cont — & is defeated by plea of tend — & afterwards demands it & is refused — he may maintain trover —

Upon the Cr refusal the Dr waives it — he wd then be liable on his cont — & if he shd plead tend the plff might traverse it in his repn — (these are G. speculations)

This is not at C.L. defence to this or any other action, but by stat 2. & 8 Geo 2. this is made a good defence 1 Selw 168. Esp D. 238. 2 pt 75: Set off

In Equity the Deft might in certain cases obtain a set off witht any stat L. as he may now have in this state at present. 3 Bl 304. 4 TR 143. Comp 56. 6 TR 456. 2 H Bl 440. 1 H Bl 657.

But by these statts mutual debts tho of difft natures may be set off at Law, provided both are due in the same right & provided the debt due to the deft was due to him at the time of the action brot Lawes P 157. Bul 180. 1 East 375: 10 East 418. Esp D. 239. — Selw 164 n. — Session 24 — Chap 90.
Hence a separate debt cant be set off vs a jt debt. a debt due from one partner cant be set off vs a debt due to the partnership.
— We have no stat of set off — (vide 1 Selw 169. Esp D 238.

It is a good defence to this or other actions, that the debt has been recovered from him by a creditor of the pltf — Foreign Attachment.
If a debtor absconds leaving a per here indebted to him (the absconding party). the cr of the absconding debtor may sue the debtor of the absconding debtor.
This defence is founded entirely on statute. & may be given in evidence under the genl issue.
There are other defences — Eq Accord & Arbt — usury — illegality fraud &c which are treated of in distinct titles — — Assignment by the debtor is a good answer to this action by the garnishee —
At C.L. set off must be pleaded specially. In an action on an open policy of insure There can be no set off. 2 John R
Set off & a debt cant be pleaded to a claim of damages —
A debt barred by stat limn cant be set off. Bul 181.
Money pd voluntarily tho by mistake cant be set off. Esp D 239. 1 Selw 167. A debt due to one as surviving partner may be set off to a debt of his own. 1 Selw 168. Esp D. 240. Bul 179. Wils 2 54.
(1 Selw 167. contra)

Usury

Usury is defined to be the takeing of or contracting for illegal interest for the forbearance of the principle the contracting for illegal interest is the reservation of usurious interest & makes the cont void — but the take usurious interest does not make the cont void

Interest is the premium whh the debtor pays to the Cr. for forbearance of the debt = the takeing of other things exorbitantly than money — it is said may constitute usury — Ord 4 3 T R 53. 2 do 238. Cowp 114. 770.

For the Stat of 12 Ann includes the loans of money merchandise — wares &c — Ord 1. 21. Appendix 7.
but unless specific articles are lent as a substitute for money there can be no usury
The takeing of exorbitant interest & during some period of the Eng history — takeing any interest was held to be usury — but what exorbitant usury was is no where told — No definite rule has established till lately — or till Hen 8 — Chap 9 — Ord — 19. 20 — 3. 11. 12. 31. 236 454-5. Palm 290
The takeing of exorbitant intt at C L was an indictable offence — Ord 7. 8. Palm 292.
By the present Eng Stat 12 Ann interest is fixed at 5 per ct — & any cont reserving more is void. 1 Atk 346. 2 Lev 142 — here it is 6 per ct —
But the word here can't be taken in its strictest sense — because some usurious conts are only voidable —
If a party bound by a usurious cont brings a bill in Equity — here Equity will direct the debtor to pay the prin & legal interest — here the cont is not treated as absolutely void.

Usury

If the borrower pledges goods to secure an usurious debt - & brings trover to recover back the goods - the Ct will not regard the contr. as void -
We have a stat to enable the borrower to make defence - by appealing to the conscience of the Cr. - & if the Cr does acknowledge the usurious contr. the Ct here will direct the prin. & legal interest to be pd.

Usury is predicable only of a loan - ord. y. Stat. every Dr is a borrower - & every lender is a Cr - in the L of usury - Conf 115 Ord 28-9. 1 East 195:
The word used in the stat, giving day of paymt is the same as forbearance - 1 Com 196.
The thing lent by the terms of the contr must be returned or repaid - hence if the prinl by the terms of the cont & bona fide put at hazard - a reservation of more than stat allows - is not usury. Ord 23-5-39. 42. 72. 2 Bl. R. 548. Cowp 28. 518. 2 Ves 143. 1 Atk 34. Cro El 27. 43. 3 Mod 390. 1 Ld R 286. 4 SR 356.

A hazard merely consequential does not fall within the former rule - eg the possibility of the Dr becoming insolvent - the loss of the prin must be provided for by the express terms of the cont - 2 Ves 172 -

A bottomry bond reserving more than 5 or 6 per ct is not usurious -
The loans contemplated by the Stat are not those in wh it is necessary for it to be specifically returned loans within the stat are those in wh the thing lent is to be returned of the same kind - & not to returned specifically returned.

Usury

It is not essential that the agreet for usury shd be made at the time of making the loan — or: the lender makes a loan — & then takes new security for the loan at some time afterwards this last security is held to be usurious — Ord 28. 6 Mod 303. 12 Do 385: 4 B Ct 30. 2 B C C, 404. 1 Ves 531. 1 East 195

Eq. If A sells goods to B. for a given sum on cr now the price is considered as A's money in the hands of B.

In Eng legal interest is 5 — in Conn 6 per ct — in South Car 7 — Alabama 10. N York 7 per ct — but interest exceeding 6 per ct is not in all cases usury — a cont made in a foreign country allowing 10 per ct — it will be enforced here — & will not be considered as usury — lex loci contractus governs. 2 Burr 1078. 1 Bl R 267. 1 Eq Co 259. Dab 38.

But if a cont made in a foreign country with a view of performance here — our Cts will treat it as usurious — eg parties residing in this state go into N York & make a cont & then return —
1 H Bl 147. 412. Bull 114. 2 Burr 1080.

But upon a judgt rendered here upon a foreign cont the cont is at an end — 2 Burr 1094 1 Bl R 267. Pow Mort 421. 3 Atk 727. 1 Ves 428. Ord 34

If a cont is made reserving the legal interest at the time of the cont made — & before the debt becomes due a stat is passed lowering the the interest this will not effect the cont — 2 Ves 42. 145. Haw Chap 82 — sec 10. Ord 35.

Usury

If foreign interest having accrued is turned into prin here — the consolidated amt will draw only the rate of interest here

A cont reserving originally compound interest — this cont is not usurious — but the Cr can recover no more than the prin & legal interest Pow 441. 2 H Bl 144. 4 BR 613. 2 Anstr 495. 1 P Wm 652 — 1 Atk 304; But if ~~compound he~~ actually pays the compound interest he never can recover it back — & if simple interest has actually accrued — & then there is an agreet by the parties to pay interest upon that interest this is valid to all intents. ow 37. 1 P Wm 652. 4 BR 613. — 1 C. 2 Salk 449. 2 Ver 134. Pre Ch 160-1.

A judgt rendered for prin & interest converts the interest into prin so that the prin & interest will afterwards draw interest, Pow R 430. 1 P Wm 678. 453. 480. Pre Ch 500. 2 Eq Ca 530. 3 Atk 522

If compound interest is reserved for the purpose enforcing the payt of the simple interest merely is considered as a penalty — & not usury — salk 449. 8 Mort 424. 2 Ver 316. 289. Pre Ch 160-1. 3 Atk 520 3 Bl 432.

No cont is usurious unless the intent of the parties was to reserve a higher rate of interest than is legal — but this does not mean that the parties intended to reserve more than legal interest — but that they intended to reserve wt they did reserve — A mistake in matter of fact does not make the cont usurious — As the mistake of the scrivener — &c Cro El 643. Cro Ja 677. 578. 2 Bl R 865: 1 Cent 83. 107. 1 B&P 144. 151. ow 59. 3. 68-2 — &c.

Suppose the lawful rate of interest is 6 per ct – & the parties suppose the legal rate is 8 per ct – here the cont is void –

If the parties through a mistake in & adopt a wrong rule of computation the~~y~~ cont is usurious. but if this mistake is in the application of a right rule it is no usury. 1 Cam 149.

Where the prin is by the terms of the cont put at hazard the premium however high is not usury. but if the hazard is merely colourable the cont is usurious. Cro El 741. Ord 39.
Upon this prin bottomry loans are not usurious however high ~~soever~~ the premium is – Marshall 632. 2 Bl 458. Ord 42. 2 Ves 154. Cro Ja 208. 508. Comb 133. 1 Lev 54
Upon the same prin post obits are not within any stat of usury 1 Atk 301. 5 Ves 27. 53.
Post obits may be set aside in Chy – not because they are usurious – but oppressive. 1 Atk 301. Ord 41.

So where A lent to B 30 lbs – & B gave to A a bond of 100 lbs to be pd on A's son being maried, if A was alive at that time this was held not usurious –

Transferring of stock vide. Ord 46. & Cart 304. 5 Esp 164. 4 B Ch 28. 1 Ves Jr 57. 527.
If money procured by a sale of stock – is lent on an agreemt that the stock shall be returned on a given day with so much interest as the stock shall ~~bear~~ produce – it does not make it usury 3 BR 531. 1 Ves Jr 527. 4 B Ch 28. Ord 81.

Usury

If money is lent on an agreet that the lender shall share in the loss or profits of the Dr trade – this is not usurious but if the agreet had been that he shd share in the profit only – the contt is usurious – 2 Bur 891. 4 BR 352 – Ord 44. 2 Ver 248.

If the prin is to be repaid – & the interest exceeds the legal rate the reservation is usurious. 2 BlR 863. 1 Wils 390. 395. 1 Atk 351.

Ex

If A lends money to B on stock that yeilds 10 per ct, to be receid as the interest – ie the dividend of the stock – Eq [illegible] the stock –) it is no usury.

If the borrower has it in his power by the terms of ~~payt~~ the contt to avoid the payt – it is not usury – so a penal bond is not usurious – because the Dr may avoid the penalty –
So a mortgage is not usurious altho the estate is treble the value of the debt – because the Dr may avoid by payt. Cowp 112 – 795 – Cro J 509 Ord 48–9. 2 BR 52. 3 Do 531. 1 H Bl 224
So if a bona fidei sale is made, on condition that if the vendee does not pay on a given day, he shall pay double the price – this is not usurious – Cowp 112. Ord 57–8. 4 Ves Jr 678

But if the augmentation of price is made to depend upon the will of the vendor it is clearly usurious. 1 Vent 252. Ord 57–9.
The reservation of legal interest payable at weekly or monthly payts is not usurious – & so for a longer or shorter time – for this is only after the rate of legal interest annually – Cro Ch 283. Cro Car Ord 53.

Usury

If a lender of a given sum takes a mortgage of the annual value of the sum due it is not usury Ord 53.

But it was formerly held that if in any case that the interest was deducted at the time of lending it was usurious

If the lender at the time of lending deducted interest so as to reduce the sum lent to less sum than 100, bears to five - it is usury. Cro J 26. - Noy 171. 1 Bulst 17. Ord 54. 102. 118.

But if the sum deducted at the time is no more than 5 per ct on the 100, it is not usury.

But it is the practice of all Bankers to deduct the whole interest in advance. 2 Bl R 793. Chit B 54. Ord 54. Doug 223. 1 B & P 144. 2 Caines 664 678. 763. 15 John 162-8. 7 B R 180. 9 Mass 54-5. Peters R 170. 2 Austin 459. 8 Wheat 354. 12 Intel 58. Phoenix Bank vs Watrous. - August 1829 Litch-field Superior Court)

The doctrine of taking interest in advance applies to cases other than negotiable notes - Chit 53-4. 3 Wils 262, 1 Bulst 20.

This usage was founded on necessity - & exists now for the same reason - & is now a universal usage - & indeed the banks could not exist with it - however this usage existed before banking operations become systematized - Bank were first ~~used~~ in use in the last of the 17 century - or first of the 18 centy. Settled in N York that Banks might take interest in advance on negotiable notes -

Thirty days considered as a month & as one twelfth part of a yr - But in this way they gain more than lawful interest - 2 Caines 664. 677. 783. - N York fire insurance comp. vs Sturges - Fairfield County in this case the Judges were divided -

Usury

Decided in Vermont that Rowlett's tables are correct. Such is the mode of computation on notes for days. But Rowlett's table on notes for months are computed at the rate of 365 days to the yr

The ques first made in N York as to the mode of computing interest — & on some decisions in that state, that taking interest at the rate of 365 days to the yr. was wrong — some of the banks then changed to Chapman's tables — (& vide stat passed Conn 1829. J.G. thinks the N York decision is very erroneous. See Laws.

If the lender incurs any trouble from the loan, any reasonable expenses may be deducted for this trouble — wh is not usury. 2 B R 52n. 1 B & P 144. Ord 55. 59.a
But where such charges are resorted to as a mere cover for usury — it will be considered usurious. Holt 706. Ord 58-9. Peake R 217 7 B R 185. 1 Cart 92. 1 Camel 179.
The rule is genl that a discount of a bill at more than legal interest is usurious (c.) Phil Ev 55: 1 Cart 92. 4 Mass 162. 7 B R 185. 2 Comm 175.
The discount of a bill deducting only the legal rate of interest & advancing the sum part in cash & part in bills without any rebate upon these bills. it is usurious 1 Cart 92.
Usage is sometimes mentioned in case of extra ordinary allowance — as defeating usury. Ord

The only effect of usage is to rebut the presumption of usury- it can^t repeal the stat. 1 B&P 144 Ord 59. 7 T.R. 185: 1 East 92. 2 Day 483. Peak K. R. ca. And the ques of intent in such cases is to be left to the Jury- Ord 59. a. b) 1 B&P 144. 2 Day 483.

The devices & subterfuges that men have resorted to, to evade this stat are more numerous than any other — but all these devices serve only to bring it within the stat- (vide stat of Usury).
These artifices are resorted to.
I. When there is annexed a merely conditional risk it is usurious. Ord 65. 72. 39. 4 Ves 143
II Another mode is the making a loan in the form of a sale. Ord 57-8. 64. 79. 77-8. 1 Atk 351. 2 Ves 155: 1 Ry Ca 91.
III Another way is by dry exchange, - as where A lends money to B. secured on a fictitious drawee abroad. Ord 66.
IV. By lending stock to be returned at a given time - with an agreem^t to pay a greater sum than the market price of the stock - Ord. 66. 79.

V. On a loan of money - that the lender shall receive part of the Dr's profits in his trade - it is usurious 4 T.R. 353. Ord 66. ie if he does not bear also part of the loss if any occur.
VI By substituting for a loan in form the purchase of annuity
Cowp 770. Ord 66

VII. By adding to the loan, a lease reserving exorbitant rent - this is usury - Cowp 440 Ord 67.

VIII. By the lenders takeing a beneficial lease in consideration of the loan. Ord 67.
These are the disguises used in contr for usury. 4 Leon 258. Ord 67.

In all the cases where a contr is in form of sale & unless it appear that it was for money - it will be regarded as a sale & no more - there must be a negotiation for money to make the contr usury.

The first badge of fraud is merely colourable. now if the hazard is very slight it is always considered usurious. Ord 69. 72. 2 Ves 143. Cro El 643. Carth 67. Salk 390. Comb 92.
To take a case out of the stat on acct of hazard the risk must go to the prin. & not to the interest. Cro Ja 508. 1 Atk 342-351. 2 Ves 155. 2 Bl. R. 863. Ord 72.

Mere inadequateness of price on an ostensible purchase by one of the parties. altho it is often a badge of usury - but it is never per se - 1 Rol 242. Cro El 27. Cro J. 252. 2 Lev 7. Mos 169. 2 Bl R 859. 3 Wils 390. 2 Stra 1243. Doug - 1 B&P 151. 3 TR 558-9. 4 Day 491. 1 Esp R 198.

Where the transaction is in form a sale & pur or any thing ~~else~~ than a loan in form - the only ques in such case is whether it was a disguise for usury - or whether it was really a purchase - Exorbitancy of price on an ostensible sale upon credit is a strong badge of usury.
A applies to B. for a loan of money. & A sells goods to B at an exorbitant price that B may raise the money with the sale of them - it is usurious. 1 B&P 149.

And in this case if the Dr applies to a Ct of Eqy. the ct will regard the price for wh B sold the goods & will compel him to pay no more than this sum - with the legal interest 1 Eq Ca 91.

The rule is the same when the amt advanced is part in money & part in goods at an extravagant price - 1 Eq R. 40. Dalry 736. Coll 493. Ord 78. 114.
On an application for a loan - stock is sold for more than the market price - on credit - with reservation of lawful interest on the whole price this is usurious -
The embarrassed ~~situation~~ situation of the party is often a badge for usury - when there is any disguise.
The form of security sometimes affords evidence of usury - 3 Atk 278. Ord 69. 89. 2 Bl R 869.

But when the transaction objected to is not in form of a loan - the rule is that the substance of that transaction is the test - 4 B C L Conf 112 Ord 44

The subseqt acts of the parties sometimes afford evidence of usurious reservations. (2 B. R 869. 2 Rol 531. 1 Mo 38)

Usury even in a deed is proved by parol evidence.
If a party who has entered in a contt & defends himself on the ground of usury - he may prove it by parol - 3 Co 69.
Cro E 252. 9 Co 26. Peak Ca 119. 2 Wils 347. 3 T R 478. Dou 477

If a written contt imports to be usurious upon the face of it - parol evidence is admissible to show the contrary. Ord 80. 98. Cro El 501. 2 Mod 307.

Usury

If a deed is taken for prin & legal interest only – & a seperate note is taken for more than the legal interest – the note & deed are usurious. Cro El 28. 1 Bond 232. 237. 238. Ord 99.

If a bond is given for prin & legal interest only – & is accompanied with an agreemt by parol for more than legal interest both are usurious. Cro Ja 252. Peak Ca 119.

The ques whether a substance in form of a loan is so or not is to be decided by the jury. Ord Cro J 507. 11 E R 345. 2 Ve 177. & in others by the Ct –

What is a loan seems to be a ques of [illegible] –

What the transactions were in point of fact are ques of facts for the jury – but when all the facts being ascertained & the ques whether these facts are usurious is a ques for the Ct –

3 T R 539. 1 Esp R 178. 9 Dal 451. 2 Com R 192.

The ques is a mixed one & can't in cases be seperated –

The effect of reserving usurious interest is to make the cont void – & all security upon the cont – Ord 49. 96.

If the original agreet is usurious all agreets of security are all void 1 Leon 307. Ord 91.

This rule effects all conts in every form Doug 376. If the security of an usurious cont is taken in the name of a third person for the benefit of the lender it is void.

If A owes B a legal debt & B owes C on a usurious contt for the same amt. & A gives his note C to secure B - this is usurious, & C can never recover of A. tho B might have recovered 1 East 195.

If a usurious ~~intent~~ security is given with surety - & a counter bond of indemnity is given it is not usury 2 Leon 166. Cro El 642, 588. Noyes R 73.

It has been held that if the surety knew that the cont for which he was surety was usurious - he cant recover on the counter bond. ibid

A security originally valid cant be made usurious by any subseqt usurious contt whatever. 1 Saund 294. Cro El 20. Ray 197. Cw 101. (a).

If the original debt was lawful - & subseqt security the usurious. does not destroy the original debt. 1 H Bl 462. Cw 103(a) 1 Saund 294. 4 TR 390. 1 East 92. 2 Bur 1078. Cro El 20. (1 Rol 296 contra)

But if one usurious contt is made the consideration of another, both are void:- 3 TR 531. 4 Do 390. 5 Esp R 22. 4 Do 11. 1 Saund 295: (n).

This rule suppose that the last security reserve usury.

If a usurious bond is assigned to a bona fide purchaser - & he takes new security, this last security is not usurious. 4 TR 390. Cw 103(a). 5 Esp R 22.

If a security originally legal, is assigned upon a ~~security~~ usurious considn but is afterwards transferred to a bona fide purchaser - it is good in the hands of the bona fide purchaser - 1 East 92. 1 Esp R 294. Cw 103.(a) Chit B 53-4 Byd B. 115. 1 Saund 294 & 4 TR 390. Day 78.

177. Usury.

"When A gives his note to B. & C indorses it ~~& then~~ or discounts it on a usurious considn with B. & is afterwards assigned to D. a bona fide holder. he may recover vs C. or A — (not very clear) 1 Cam 141. 8 John 98. 2 Com 175. Peake R 273. 1 Phil Ev 275. 5 Esp 119. 1 East 92. Chit B 53.

If a usurious cont is taken up & a new one given for no more than legal interest — the cont is good as between the original parties. 1 Cam 157. 165 (n). Ord 183. (Yelv 47. (a) n) 10 Mass R 121. 3 Day 356. (1 Cam 157 contra)

A cont or security reserving no more than lawful interest is not invalidated by receiving more than lawful interest Ord 103. D — 3 Atk 141.

It has been said that the actual taking of more than lawful int is evidence of a usurious agreet — J.G. thinks this incorrect —

The true distinction

The illegal agreet to pay more than lawful interest makes the agreet void — but does not incur the penalty of the stat —

But the actual receiving of unlawful interest incurs the penalty, but does not make the cont void.
Roy 196. 7 BR 149. Doug 114-15. 1 Saund 295.

If a bond is given upon a usurious considn a subseqt agreet for no more than legal interest will not make the bond good. Hob 164. Ord 105.
And the bond is void vs the representative. & all persons claiming under him. Hob 167. Ord 106. Noy 129.
So if the borrower becomes bankt — the cont becomes void vs the assignees. Ord 105: but it is good as vs a stort feoffor — 1 Leon 307. Ord 110.

Where a note is originally usurious & indorsed over to a bona fide holder he may recover of the indorser. Ord 109. Chit B 28.
These analogies all hold as to money won on wager.

Where a note has been negotiated & usury has

No holder can recover of any party intended to be protected by the stat.
The party reserving usury. can in no case recover of any one –

The lender on usury can^t recover the usurious debt or retain a pledge retained as security for it. 1 Leon 309. Ord 110. 91.
One qual^n as to the pledge – if chattels are pledged the borrower can^t have trover for them unless he tenders the prin & legal int – Ord 111.

If the borrower does pay an usurious debt he cant recover back any more than the overplus

Pleadings in Usury.

Usury may be pleaded specially or given in eviden- under the gen^l issue – & may be given in evidence on simple cont^t debt 2 Burr 1010. 1 Chit P 170-2
But to a usurious bond &c the defence of usury must be pleaded specially. Hob. 72 5 Co 119. Esp D 223-4 2 Blk 118. 2 Salk 391.

Usury

In a plea of usury the corrupt agreet must be particularly set out upon the record, it is not enough to plead that the debt was usurious 2 Keb. 525. Ord 92. 2 Show 327. 2 Mod 385:

But if a judgt has been recovered upon an usurious contt that judgt can't be impeached Cro El 25. Ord 93.

A judgt is not within the stat of usury.-

In a case of a borrower on usury being sued he gave new security to settle the suit- it has been held that he could not plead usury when sued on the new security— (not law).

A stat merchant or recognizance given as security for a usurious debt may be avoided under the stat- tho they are matter of record. 3 Co 80(a) Ord 93.

A judgt entered by confession- or entered by power of atto- given to the lender in order enforce the usurious contt- this judgt may be impeached Stra 43. Ord 94-5:- they are considered only as voluntary security. & are not regarded as a solemn judgt.-

As to the mode of impeaching such judgts there contra opinions 2 Barnes 229-

Held in the Ct of KB. that it must be by bill in equity- 1 Anstru 7. Ord 96.7.

Clear that such judgt that such judgt can't be impeached collaterally. ie usury can't be pleaded in sci fa brot on that judgt Peak 39 1 Bay 190. B N P. 232. 713 269.

By the stat. Connt the deft has another mode, where the Deft is sued on usurious contt he may file his complaint, whh is in nature of a bill in equity. & then the Ct will proceed in the way pointed out by L. & he may then call upon the pltff to testify on oath – & if the complaint is proved – the Ct will relieve the Deft of all interest. & give judgt only for prin – (see Tit. Usury) but the Deft can't testify 1 Root 129. 255. 367. 115.

The repln to a plea of usury was formerly required to be special – but this has been found inconvenient – now held that a genl traverse is good – & it sufft to say that it was not corruptly agreed &c as the Stat – or that the cont was not made for the purpose mentioned in the said plea – same mode of traverse is allowed to a plea of gaming 1 Chit P 616. 2 T R 439. 3 Do 426. 1 Saund 103(b) n 3. 1 B&P 144.

This genl traverse may be either with or witht an inducement. (Id).

Under the Eng stat the rect of more than lawful intt subjects the receiver to treble the value – Ord The action must be brot on the stat to recover the penalty – under our stat the forfeit is only the single value – one half to the state.

181.

left by mistake

Usury

Under this stat the Cr is only the crim^d party formerly held that the Dr was particeps criminis. (Ord) The Eliz stat inflicts a penalty on agents employed. Ord Appx.— to incur the penalty the lender must actually receive the usury to make him liable for the penalty— Ord 117-18. Doug 235 3 Leon 205: 4 Do 43. 1 Saund 291. n1.

But it has been made a ques— whether the taking of more than lawful for having forborn is usury. & incur the penalty. 1 Keb 744. Ord 117. n)
I.G. thinks it not usurious.
To complete the offence of usury the usurious int must have been rec^d in money, or money's worth— mere security for money will not complete the offence. 7 TR 180. Ord 118.
But the whole pen^y is forfeited by taking of any part over legal int— Ord 118. (a) 1 East 195:
Doug 223. (A Dictum Cro El 20. that is not Law)
Doug 236. Ord 118 (b)
A difficulty arises to decide when the offence is complete where part of the int is paid at one time & part at another— the action for the penalty must be brot in 1 yr
1 East 195- Ord 53-4. 118.
When the offence is complete the stat of limit^s begins to run
If more than legal int is taken at the time of the loan the offence is then complete, & the action must be brot within 1 yr from that time— (Sd) 2 Bl R 792.
Doug 236. 223. 1 Bulst 17. Ord 54. 102. 119.

Suppose, under the Eliz stat there is a cont^r for £110. & £5; pound is taken in advance for int— is this a loan of £100 or for £95: — I.G. says it is a loan for £110.— altho the Dr recives only £95—

If the loan is for £100. the int is recd for £100. & is actually the same as if the lender had lent £100. & the Dr had pd back the £5; 3 Wils 262. Doug 223. 1 East 195; (7 TR 180 contra) - but the rule is established S.G.) If it is regarded as £95 only, the deduction of £5 can't be considered as int.

Evry successive rect of usurious int is a repetition of the offence & incurs the penalty - 2 B&P 381.
By the Eng stat the penalty is recovd by action. bill - or information - & held that indictment will not lie 11 Mod 174. Ord 123. (incorrect S.G.). why can't indictment lie) (1 Sidn 421. 3 Salk 391. Ord 124 n) Stra 816. to shew that it is a departure from all analogy).

It is a genl rule that the terms of stat must be pursued. it is not enough to aver genly. but it must be stated as it was - Ord 125: 1 Leon 96. 208. Cro J 104. 1 Keb 629. Stra 816.
So also the parties must be named in an action for the penalty. Noy 143. 2 Leon 35. Ord 127.
In prosecutions for the penalty of the stat. the same strictness is not required. as when the agreet is pleaded in bar of an action of debt. Cro J 440. Ord 126. 2 Hawk Ch 82. sec 25.
But in a prosecution for the penalty of the stat. it is suff to aver that more than legal int was recd. 2 Leon 35. Ord 127.
Ord says that the time of receiving must be precisely alleged - in order that the prosecution may appear to have been commenced within 1 yr - (but this can't be true -) Ord. Cowp)

Usury

The time or length of forbearance must be truly stated in the declaⁿ 4 Esp 152. 5 Do 83. Cowp 671.

In a prosecution for usury for a loan of money it is suff^t to prove that the sum advanced ~~was~~ part in money & part in goods ~~for~~ as money. 1 Hen Bl. 283.

In what cases int^t can be demanded
When int^t expressly agreed for: it demandable & recoverable according to the agree^t. Chit. B 213. 1 Cam 50. 52. 129. 2 N R 206. n)
But when there is no express agree^t for int^t. it may be recovered in many cases. & when there is no such agree^t the gen^l rule. that int^t is demandable & recoverable on all liquidated sums from the time of its becoming due. i.e. from the debt becoming due; 2 Burr 1085. 4 T R 124. 2 Bl R 761. 2 T R 58. 1 Hen Bl 304-5; 3 Wils 205. 265. 1 Cam 50. 2. 129 2 N R 206 n)

But it is said that int^t is not recoverable on goods sold & work & labor done on credit. but if the agree^t is to pay on a given day & no pay^t is made on that day. int^t must clearly allowed but if no price or time agreed on, *secus*. 1 Hen B 305. Chit B 213. (2 B & P 334. Daily 346. 4 Dallas 289. 2 N R 206. n)

A debt or demand liquidated by judg^t draws int^t immediately. 1 B&P 29. Davy 752. 3 Dall 3) 4 Dallas 257. 2 T R 58. 9. 2 Bur 1097. 2 Stra 931. 4 Bur 2128.
But a judg^t does not draw int^t vs bail in error.
An obligation payable on demand for a sum certain will draw int^t from the time of demand–
In this State a note on demand draws int^t from date) Conf 796. 1 B C R 761. 2 T R 58. Chit B 213. 2 N R 206 (n) Watson Part 208.

But if a penal bond condition for the pay^t of a sum certain is not made payable at a certain time, or on request, – it draws int^t from date tho int^t is not mentioned – 7 T R 124.
But it is held that no int^t is demandable on a single bill – a single bill is for the precise sum due 1 B&P 337 but if it is on demand & the plff demands – int^t will accrue from the time of demand–
It is said that int^t not recoverable in ass^t for money had & rec^d 2 B&P 472. 2 Bur 1005 – 3 Kaines 266 but this means nothing more, than, that the mere fact that one receives money for another this action will lie for the int^t till demanded. But int^t for money had & rec^d has been, lately held to be recovered 1 Camp 52. 129. 2 N.R. 206 (n).
Where int^t is rec^d wrongfully – money had & rec^d will lie –
Int^t on acc^t stated is recoverable from the day stated – 3 Wils 205. 2 B&P 337. 2 Ves 365: 5 Esp 114.

Usury.

When from the cours of dealing between the parties it can be infered that int was to be pd. it will be enforced — Ib. by usage of merchants — Kirby 289. Fol Eq. 247(a) Day.

Int is recoverable on arrears of an annuity — 3 Atk 579. 2 N.R. 206 n)

On legacies int is sometimes recoverable — if a legacy is charged on land — or any fund yielding int or profit — it will draw int

— So too if there is a specific legacy — of prop which of itself draws int — the legacy will draw int 2 B&P 206. n) 2 P Wms 26. 3 Do 253. Ves 3 & 2 Do 568.

In some cases int is demandable of Ex^r & Adm^r of assets remaining in their hands 2 Ves & 5. 1 BCh 359. 375. 9 Ves 548 —

If a mere depositary wrongfully detains money — he is charged with interest. 2 N-R 206.

After a creditor has received the prin he cant recover the int in a separate action — but he must accept it as principle. 8 TR 229. 1 Esp R 110. 2 N R 206 n)

Int is considered only as an incident to the prin.

Slander.

Slander consists in maliciously defaming a person in his reputation, & this may be committed either by words spoken or written – or by figures & emblems with words. & in genl any words written or spoken whh tend to injure one in any point of personal security, connections, office, profession or interests, are slanderous & actionable. 4 Co 14. B. N P 9. 3 Bl. 123. Esp Di 496.

Slander is an action on the case, & founded on the stat. Westr 2d

Slander may be committed in three diff^t ways.
I. By words spoken. II. By words written. III. By figures.
The two former kinds are in part by words. but slander by words in L. means oral slander.

I. Slander by words is of two kinds. 1. consisting of words actionable in themselves & 2d. words, not in themselves actionable, but becoming so by reason of some special damage. The latter class consists of any words whatever, for any words whh injure if maliciously spoken are actionable tho' not per se actionable. 4 Bac 483. 494. Esp D 496.

The rules concerning oral slander apply genly tho not universally to slander by words written. They are to be taken as applying to both except where the contrary is expressed. 4 Co 14.

I. Oral Slander – To render words slanderous in L. falsity & malice must concur – but certain words when false are considered in L. of course malicious. And malice in the L. does not of course mean personal ill will or malevolence to the party complaining. but any wicked or immoral motive is in L. malice. E.g. From malice to A. one shd defame the parent, child &c then words are in L. spoken maliciously of the parent, child &c in analogy to the rule in crim L. if one intending to shoot A. shoots B. he kills B maliciously.

195.

Slander.

For words per se actionable the pltf may recover on proving merely the words spoken, for damage is implied in words in themselves actionable & they primae facie import malice. But sometimes, tho rarely the presumption of malice may be rebutted by showing that they were spoken under circumstances whh exclude the presumption of malice Bul 6. 4 Bac 483. 1 T R 111.

Actionable words are of four kinds. I. Those whh bring the person of whom they spoken into danger of legal punishment.
II. Words tending to exclude the person from society.
III. Words tending to injure a person in his trade or profession.
IV. Words tending to injure one in his office. 3 Bl 123.
4 Bac 483-93.

It appears then that words may be actionable whh do not injure ones moral character & that words that do injure ones moral character may not be per se actionable.

Words which charge a crime.

I. Words whh charge a crime.
If the words charge a fact whh wd make one liable to corporal punishment, they are clearly actionable in themselves, 4 Co 15. Cro El 662. 698. 609. 1 Wils 177. 186. Cro J 117. So words whh charge a fact whh subjects one to banishment & to tumbling. Rol 36. 4 Bac 486. So to imprisont for this is corporal punishment. Comb 137. Salk 697. 2 Ventr 266. 1 Rol 46. Cro Car 8C 315. 2 Salk 696. contra. 1 T R 146. (5 Johns R 15.)

Held in Connt that words whh charge an offence, whh subject to a fine, are slanderous or not, as they are of an offence infamous, or not. The Eng books seem to countenance the same distinction. — Eg keeping a ~~[illegible]~~
+ carrying about in a cart.

Slander.

To charge one with keeping a lewd house is slander _per se_ tho the offence is merely fineable. But to charge one with an offence punishable by stat with fineing is not _per-se_ actionable. 4 Bl. 168. 4 Bac 487-8 5 Johns 191.

{Words wh. charge a crime

Esp says words charging a crime wh. subjects to prosecution are _per se_ actionable. but this is _too broad_. a mere trespass subjects to prosecution. Selwd 104. _Esp D 497._ Cro El 39. 4 Bac 485.

Words charging an offence wh. wd subject one to punishment to be actionable must charge a positive act committed. *to say he gave J.S. counsel to kill me is not actionable. 4 Co 16 b. Esp. D. 496. so where the words were, "I expect to see him indicted for stealing," these were not actionable. Selwd 8. Again "J.S. is in jail for stealing a horse" these were not actionable for the construction was, he was in jail on a charge for stealing &c. but these are suff^t after verdict. Selwd 2. Esp. D 497. _2 Wils 306._ Hardk R. 337. 2 Selw. 11.

Adjective words are admitted or not as they presuppose a criminal act committed or not. Ex. seditious, traitorous, _thievish_, but _perjured_ is actionable. 4 Co 18 b 19 a. Esp D 497. But to say he is forsworn is not actionable without other words wh. imply that it was in a Ct of justice &c

But, "he was forsworn in such a Ct is actionable
Cro El. 609. 3 Lev 166. 4 Co 15. 4 Bac 484.

In Conn it was decided that to say one was forsworn in a church meeting is actionable. 2 Conn R 40. But this was contrary to all _Law_.

* Co doubtful.

Slander

Words wh charge a crime. After one has been pardoned for theft, to say that he is a thief is actionable, for the pardon in Law extinguishes the crime, for the fact that he has been a thief can't be proved. Hol 81. Ray 23. Esp D. 497.

But suppose one shd say at such a time J.S. stole & has since recd a pardon, could the words be justified by proving the truth. J.G. thinks he might, he is not a thief, but in truth he has stolen.

So falsely charging one of a crime of wh he has been acquitted is actionable, tho these words can never subject him to punishment. 4 Bac 487. Owen 150.

It is not indispensable then that to render words actionable there shd be actual danger of punishment it is sufft that the words wd subject one who committed it to punishment.

It has been held in Court that to charge one with a crime wh is outlawed is still actionable.

If the crime is impossible it is not actionable to charge it. 4 Co 16(a). Bul N.P. 5. Esp D 498. Eg. I say you killed J.S. when J.S. is actually living; in this case however, if the fact that J.S. is living does not appear on the face of the record, the Deft must put it in on record by a special plea. Bul N.P. 5.

So if to words charging a crime a description is superadded not corresponding with the crime, the words are not actionable. Eg he is a thief for he ~~stole~~ cut my timber trees growing on the land, for the offence is merely a trespass. 2 Lev 104. Cro J 674. 4 Co 13. 14. 19(a). 2 T.R. 935. Bul N.P. 5. Esp D 511. 517.

It is no defence to actionable words, that the plff can't be punished b/c Stat. lim. barred it.

Words wh tend to exclude a person &c. II. Words wh tend to exclude the person of whom they are spoken from society— this class consists of words wh charge one w. having a contagious disease. 3 Bl C. Hol 219. 4 Co 17(a). 2 Lev 205. Esp D 498. Cro J 144

But the words must charge a present disorder. 2 Stra 1189. 2 BR 473. formerly otherwise Cro J 430. Cro El 214. Adjective words in the present tense are actionable, as he is leperous &c. 12 Mod 248. Cro J 124. 4 Bac 488.

III. Words tending to injure another in his profession or trade. Eg to call a lawyer a knave is actionable. but to call a physician a knave is not actionable, for in the latter case the words do not injure him in his trade 3 Bl 123. 2 Vent 28. 1 Rol 52. but want of integrity is a disqualification to the profession of Law. Again to say of a lawyer that he has revealed the secrets of his client or that he is no lawyer. 1 Rol 54. 3 Wils 59. Cro El 382. Id 478. Lev 297.

Words w.h tend to injure another in his Profession

To charge a lawyer falsely with ignorance in his profession is actionable. Cro El 382. or 478. 1 Lev 297. 1 Sid 327. 1 Rol 54. same of a Physician or Minister.

But in these cases the plff must aver that he was practising that profession at the time. but as to the proof it is suff.t to show that he was an acting lawyer at the time with.t producing the record. 2 Vent 28. Pop 207. 4 TR 366. 1 Burr wall 487.

On the same gen.l prin. to call a trader a bankrupt is actionable. so too words in the future tense are actionable Eg. he will be a bankrupt in two days. (but to say of a lawyer or farmer, he is a bankrupt is not actionable) for none but a trader requires credit. 4 Co 19(a). 2 Stra 762. Carth 330. 1 Roll 61. Esp D. 499.

Slander.

Words wh. tend to injure one in his Profession.

Charging a trader with cheating customers is actionable for this injures him in his trade. Ld Ray 1480. 2 Bur 1688. 2 Lev 62.

But in actions by tradesmen it must appear in the declarn by colloquium or in some other way that the words were spoken in reference to his trade; or to him as a trader. If the words were he is a cheat there must be a colloquium. i.e it must be alledged that it was said of him in a discourse concerning him as a trader. Salk 194. Ld Ray 1417. Stra 696. 1169. 5 Mod 398. Ray 61. 165.

If however the words were "he is a bankrupt. Ld G. thinks there is no need of alledging a colloquium concerning him as a trader, for the word bankrupt, means ex vi termini an insolvent trader. Esp says diffly Esp D 514. he has no authority for this position. – but if the words are he is insolvent secus.

Falsely to call a Clergyman a liar is actionable, for his success must depend on his moral character.
Backus & Bishop in Comn. – Day R
To call a Clergyman a drunkard is actionable – tho not to other persons. 3 Lev 17. 1 Rol 58. Cro Car 253. Stra 946.

To call a physician a quack or to say that he is ignorant of his profession is actionable. But to say of a physician that he killed a patient is not actionable. but the same words spoken of an apothecary were held actionable. 1 Rol 54. Cro El 620. (11 Mod 221. But Ld G. thinks that these words charge the physician with mal-practice, & therefore that in all cases they shd be considered actionable –

As to Mechanicks vide. 2 Stra 898. 4 Bac 491.

Words chargeing a person in an office of profit with want of integrity or ability are actionable, for this tends to destroy his means of livelihood. Ld Ray 1296. Salk 695. C, 501. 4 Bac 488.

Words whh injure one in his office.

But words chargeing a person in an office of honor merely with want ability are not actionable, for they neither impeach his moral charachter or effect his livelihood.
But words impeaching the integrity in an office of trust or honor are actionable. Salk 695. 4 Co 16(a). Hob 140. Stra 617. Ld Ray 1369.
Chargeing a person in an office of any kind with inclinations & principles whh disqualify him from the discharge of his office is actionable. B.N.P. 5.
To say of such a man that he intends to usurp the government, is on this prin actionable.

When the words do not of themselves import a reference to the pltffs official character, a colloquium concerning his office must be alledged. The office of a colloquium is to explain the reference of the words spoken, to some collateral thing, to whh the words of themselves do not import a reference. Ld Ray 1369. Stra 618. 1 Lev 280. 4 Bac 489.

Colloquium.

But if the words in themselves import a reference to the pltffs official charachter, a colloquium is not necessary, his office only must be alledged. Eg he is a knavish justice. Cro. 557. 1 Lev 280.
When the words are not actionable, except as they refer to some collateral fact whh in themselves they do not refer to, a collo. is necessary for the purpose of showing their reference. to say of a judge [illegible] he is [illegible]. 5 Mod 308. 2 Saund 307. 2 Stra 1169. Esp Di 801.

Slander

Colloquium. To say of a physician he is no scholar is actionable, but a colloquium is necessary. Cro C 270. 1 Rol 54.
When the words were spoken of a trader "do not deal with him, he is a cheat," these were held actionable without a colloqm. 2 Lev 62. 2 Ray 1480.
When the words were of a trader "he is a knave he has compounded with his creds" a colloqm was held unnecessary. Qy thinks incorrectly. Cro E 240. Esp Di 50.

Innuendo. If the words do not show their own application to person or subject matter an innuendo is necessary. Eg "he is a thief" here an innuendo is necessary, for these words are slanderous only as they refer to Pl. or if the words were Pl is a thief, here there must be an innuendo (Pl meaning the pltf is a thief). Eg Again "he is a thief & I can prove it" alledged in the declan thus. "He (meaning the pltf) is a thief & I (meaning the Deft) can prove it. 4 Co 17 (b).

No words which remain uncertain to the hearers can be reduced to a certainty by an innuendo 4 Co 19 (b) 4 Bac 516.
The true meaning is this, any thing whh, taken in connection with all that past of the conversation still remains uncertain can't be made certain by innuendo. ie it can make nothing certain, except what can be made certain by a reference to the conversation. Eg a certain person whom I know is a thief. now here if it is laid in the declan a certain person (meaning the pltf) is a thief. the declan will on the face of it the innuendo is bad for the words can't be made to bear reference to the pltf. Again one of Pl servant is a thief. Carth 689. 1 Rol 73. 4 Co 17 (b). Hob 2 45: Cro El 497. 1 Sid 52. 1 Rol 81. 8 East 427.

Innuendo.

But if the Declan was he (the plff killed such a one) the innuendo would be good.

An innuendo therefore can never extend the words to a meaning wch they cant be made in themselves or by reference to some thing before spoken to bear. Comb 189. 275. Esp D 511. 4 Co 17 a.
Cro El 834. or 384.
Again the words in the declan were "he stole half an acre of my corn, (meaning the corn wch had grown on half an acre, wch had been reaped) Cro El 424 Comb 189 275. 1 Rol 82.
This innuendo was held bad.
When an innuendo is unnecessary, a bad one is surplusage & the declan is good. Cro El 609. 4 Bac 516. 1 Rol 83.
If the person spoken of is uncertain to the hearer, an innuendo cant make him certain. — e.g. one of you is perjured —
Esp D 511. 4 Co 17 b. Sidn 52. Cro El 459. Hob 245. 1 Rol 81. 4 Bac 518.
It has been held that when the action is brot for words tending to injure one in his trade, profession or office, it must appear by express words in the declan that the pltf was at the time of the words spoken in such trade profession or office. Lutt 49. Esp D 515. Cro El 205. Cro El 273. Yelv 159. Cro J 222. Cro C 282. 1 Sid 425.

Construction of Words.

Where the words are brot by a trader for words injurious to him in his trade merely, he must allege not only that he was a trader but that he gained his livelyhood by trading. *ie* buying & selling. Sidn 299. Esp D 515.
All our Books state that words of heat & passion are not actionable. 1 Lev 49. 3 Bl 185. Esp D 520. 4 Bac 522.
But words spoken in heat & passion may be actionable, the rule means that opprobrious terms wch are properly words of heat & passion are not actionable 2 W R. 335 e.g. to call one a rascal, scoundrel &c)

Slander

construction
of words
spoken.

There has prevailed three diff^t rules with regard to the construction of words charged as slanderous, formerly this action was discountenanced & the words were construed mitiori sensu, subsequently they adopted a directly opposite rule, but now the words are to be taken in their most usual & ordinary sense, 4 Bac 497. Comp 688. Esp D 511. Cro 761. Bul 4. 5 East 461. 10 Mod 1098. 3 Salk 1061.

When words in an actionable class admit of an innocent meaning it lies on the Deft to show that they were spoken without malice & with an innocent meaning. Peake R 4. 2 T R 235. Com 299. 3 Do 180. One may be guilty of slander by words in another language provided it is understood by the hearers. Hob 126. Cro E 865. 1 Rol 74.

All the words used at the time in connexion with the words complained of are to be taken together. Eg he is a thief for he stole my timber trees. 4 Co 15(a). B N P 4. 2 Mod 159. Esp D. 511.
Cts will not do violence to language for the purpose of finding an innocent or slanderous meaning. Esp D 512. B N P 4. Eg of a lawyer it was said he is a common maintainer of suits. this was held not slanderous.

The words must be directly slanderous, if the slander is to be collected by circuity & inference there is no slander. 4 Co 15(a).
Yet where the intent is clear to charge a crime, words will be actionable, tho the slander is somewhat indirect. Eg I will make you an example for a perjured Knave. B N P 4. Yelv 160. 1 Rol 49. Esp D 512. Again, I will prove that he poisoned J. S. Cro El 569. 1 Ventr 276. 1 Sid 381.
And words in the form of an interrogatory may be slanderous. Eg When will you return the sheep you stole. 12 Co 1234. 1 Rol 48. 2 Rol 165.

Genly words in themselves actionable, prima facie imply malice, Justification
but the presumption may in some cases be rebutted. Eg when Want of
the words were used in a confidential communication for a Malice
lawful purpose. as where a master is enquired of as to the character
of a servt, here the onus probandi of malice lies on the pltf. 4 Bur 2422.
1 TR 110. Bul NP 8. 4 Co 91. 5 Esp 110. 3 B & P 587.
So where one by way of warning confidentially said to a
friend of a trader, that he will soon be a bankrupt.
Bul 8. Esp D 503. 3 TR 60-1.

The circulation of slanderous words from another is in genl
slander. but if the person repeating names at the time
his author. it is no slander. Esp D 517. Cro El 40. 7 TR 17.
2 East 426. Bul 10. 9 Bing 228.
In such cases it is necessary to attend to the circumstances of
the case.
That the Deft believed the words spoken to be true is no justification,
tho perhaps it might mitigate damages. Cro C. 98.
Esp 518.

Where the pltf extorted slanderous words by provoking the
Deft he can maintain no action. Eg Dare you say that
I am perjured. Ans. If you will have it so, yes. Cro C. 297
4 Bac 498.
The truth of the words spoken is always a complete justifican
Bull NP 9. 1 Rol 87. 4 Bac 516.
And sometimes the Deft may justify tho the words were
actionable & false. Eg Words in a declaran or count, so
in complaint to a Ct of justice. Esp D 503. 4 Co 14. Hob 82.
3 Leon 138. 163. Cro El 230. 248. 9 Esp R 32.
But when legal proceedings are made a colour for
slander &c the slandered has his remedy by action for
malicious prosecution.

Slander

Justification. It has been held that slander will lie where the Ct before whom the action is brot has no jurisdiction, but this is now denied. 4 Co 14. Cro El. 230. Hob. 266. 267. 1 Rol 34. Esp. Di. 503. (1 Hawk. B. 1. c 73. s 8. 1 Saund 132, n 1) Cro J 432. 5 Esp 109. 110 (a).

The person complained of in a Ct may justify saying that the ~~Deft~~ Plff has sworn falsely, for this is by way of defence in a judicial proceeding 2 Bur 807. 1 Rol 87. 4 Bac 499. 518.
Again a party to a suit may say that a witness has ~~been~~ heretofore perjured himself, by way of objecting to his testimony & the words are not actionable. 1 Saund 132 n 1 Rol 87. 3 Leon 138. 163.

So words used in a complaint to a grand juror or to a proper magistrate as a foundation for a publick prosecution are not slanderous Cro El 149. Hob 82. 4 Co 14. 3 Esp 32. But if one maliciously complains to a grand juror &c he is liable to an action for malicious prosecution not for slander. Again where words charging crimes are used in a petition for redress of grievances they are not actionable 1 Saund 131. 2 Bur 810-11. 5 Esp 110. n) 3 Esp R

Words spoken in the house of representatives &c by a member are not actionable (if pertinent to the ques). Tayler & Collins in Comm
Words used by way of defence by a party accused before a Church Presbytery were held in Penn^a not actionable 1 Binney $\overset{86}{178}$. 5 Esp 110 n) 3 John R 180.
Words used in pronouncing the sentence of a Ct ~~marshall~~ martial are not actionable 2 N R 341.

Slander.

Justification

Slanderous words spoken by a witness in a Ct of justice are genly not actionable. but if the witness goes beyond the issue & slanders third persons. he is guilty of slander. Cro El 230 Hutt 11. 2 Bulst 269. 4 Co 14. Esp D. 504.

So also between two contradictory witnesses if one contradicts the other & says that the other swore falsely no action lies. 1 Saund 131. 2 Bur 807. 5 Esp 11 n. Esp D 515–18.

So that the words were spoken by the Deft as counsel in a cause. is often a good defence. Cro J 91. Bulst P 10. 5 Esp 110 n. 4 Bac 498. 518.

On this subject the rule is if the words were pertinent to the cause (& as Bl adds suggested by the client) the words are not actionable - G. thinks the circumstance of their being suggested by the client can make no difference. But if the words spoken are impertinent they are not justifiable tho suggested by a client 3 Bl 29. Cro J. 90-1. Esp D. 517. 4 Bac 498. 518. Bul 10. 1 Rol 87. 33.

Held in one case that for the purpose of mitigating damages the counsel might use slanderous words not pertinent. & in a later case it is held that a counsel is never liable for slanderous words. but G. sees no propriety in either of these rules - & our modern writers take no notice of either of these cases. Hob 328. 1 Rol 87. Stile 462. 4 Bac 498.

Slander

207.

Declaraⁿ. In declaring for slanderous words it is usual to state that the words were spoken falsely & maliciously, but the allegation that the words were malicious is sd. not to be necessary, (at least after verdict. 4 Bac 512. Saund 242 a) 1 Keb 273. Noy 95.
But this rule applies only to words in themselves actionable where it is sd. to be necessary, because the falsehood makes the words prima facie malicious, but this rule is opposed to all prin. Bul 80. Co Ent 516.

The plff genly alledges his good character but this is unnecessary.

It is necessary to alledge that the words were spoken in the hearing of other persons, or something equivalent as that they were spoken open & publickly, or that they were spoken in the presence of other persons. Cro El 486. Noy 57. 4 Bac 512.

Where there are two counts, in one of whh the words are actionable & the other not & a genl verdict is given, judgt may be arrested & a new trial awarded, if several damages are awarded the Plff may enter a remittitur on the second count. 4 T R 564. 1 Do 532. Stra 1099. 1 T R 508. 3 Wils 177. 10 Co 130-1. this rule has been rejected in Connt.

But if one count contains some words whh are actionable & others not & an entire verdict given judgt cant be arrested.

Slander.

Declarn.

n actions for words not in themselves actionable the declarn must alledge special damage & the special damage must be proved. for the special damage is the gist of the action. T R 130. Bu N.P. 7. Esp D. 520.

here the words are in themselves actionable special damage need not be alledged. but the plt may alledge & prove for the sake of aggravating damages. but he can prove no other special damage, than what he alledges. Bu N.P. 7. Esp D. 520 & 4 T R 133. 1 Rol. 58.

But it has been held that where special damage is necessary to be alledged he may prove special damage not alledged, but this is all prim: — The Deft can't be presumed to come prepared to meet special damage not alledged. & this rule is contradicted in the books. Stra 666. Bu N P. 7. Esp D 520. analogous cases are to be found in Battery. —

It is no matter what the words are. if they are false & malicious & have occasioned special damage — montinerny Eyre is not per se actionable but if special damage arise they are actionable. 4 Co 14. 4 Bac 496.

There is what is called in our books the slandering of title. as by calling an heir illegitimate. these do not appear per se actionable. but yet a recovery can be had by proving remote & probable damages. whereas in other cases actual damages must be proved. Cro. El. 213. 4 Co. 17. Esp D 501. 1 Rol 38.

And it has been held that this action wd lie in favor of a younger son 4 Co 17. a. Esp D 501.

Slander.

Declaraⁿ

But no action lies for slander of title if the Deft. claims himself to be the next heir. Or younger says that the elder son is illegitimate. for any one has a right to claim title. 4 Co 17. Com. D. 501.

Pleadings of Defᵗ.

Pleadings on the part of the Deft.

The genl issue is not guilty & under this issue the Deft may contend that he did not speak the words, or that they were spok. witht malice. for want of malice makes the words not actionable. & malice is of the gist of the action. 1 S.R. 110. B.N.P. 8. 1 Lev. 82. Com. D. 503. 517.

Accord & satisfacⁿ may be given in evidence under the genl issue 1 Starkie 97.

In Connᵗ. the genl issue comprehends all defences except such as arise from some act of the plff amounting to a discharge — but by a rule of practice if he intends to justify under the genl issue he must give notice —

In N York rule the same.

In Connᵗ. the plffᵗ puts his genl character as to that species of crime whh he is charged with, in issue. & this ~~genl~~ character goes in mitigation of damages. This rule has been established by immemorial usage. 1 Root 450. 325.

No such rule was ever adopted in Eng. till very lately & the same rule is adopted in the U.S. Cts. 1 Maule & Selw 284. 2 Camp 251. Peake Ev. apx 92. (1 Johns 46. 6 Mass 518. 1 P.E. 140 n).

Slander.

Pleadings by Deft. —

But the Deft in mitigating damages can't prove that the pltf has been guilty of an act similar to that charged. E.g. he has stolen a horse — now here the ~~pltf~~ Deft can't prove that the pltf stole an ox: but Deft may prove the pltf to be a reputed thief. B. N. P. 296. Peak Ev. 2.

Again, the Deft in impeaching the pltfs genl character must confine himself to that trait of character wh the words charge. E.g. if Deft said he is a perjured man — he may prove him to be a notorious liar — but not that he is a thief —

But if the words were 'he is a thief' he may justify by showing any specific act of theft, & this not in mitigation, but in bar of the action.

By Ld a special justificn can never be given in evidence under the genl issue. Eg truth must be pleaded specially. 4 Co 16. 5 Do 125. Esp D 518. Stra 1200. Doug 373.
And at Ld if the Deft does not plead the truth of the words he can't prove them truth, even in mitigation of damages. but this does not accord with analogy.) Stra 1200. Esp D 518 Bull N.P. 9. (& contra) —

One recovery of damages is a bar to another action for the same words whether the words are per se actionable or not & this holds even where subsequent damage arises. B. N P. 7. Esp D 519. Formerly necessary to prove the words precisely as alleged but now it is suff to prove them substantially. 2 Wil 718. B. N. P. 5. Esp D 521. but the sense & manner must be the same. 8 TR 150. 4 Do 217. Esp 521. B. N. P. 5.

Slander.

A distinction was formerly taken that words wh were ~~formerly taken~~ actionable could not be given in evidence to show malice, but this distinction is now overruled. When words are given in evidence wh were said at a diff^t time, the deft may show that the words were true to rebut malice. for the L does not impute malice. (Bul 10. Esp 518.) where the words are true.
Pltf may give in evidence words spoken at diff^t times from that laid in the declar^n Bul N.P. 1 Cam 49.
The words thus given in evidence must impeach the character in the same respect. Esp D 518. 520. Bul 10.

The Eng stat of limit^n requires requires the action to be brot within two yrs. but this extends only to words wh are in themselves actionable. 1 Stra 95. 1 Sid^n 95. Esp D. 519.
As a genl rule a jt action of slander by or vs two cant be brot B&P 5: 2 Bur 989. Esp D 509. 9 B C 114. Yelv 120-1.
Rule diff^t as to libels. (Our stat limits this action to 3 yrs)

But two partners in trade may sue jointly for words spoken of them as such, where the words produce a jt injury. 3 B&P 150. 2 Selw 1162. 2 Saund 117(a). Yelv 125.n
But it is left doubtful in the books whether if the words are *per se* actionable the partners may join. as that they are bankrupts, but witht doubt a jt action in such case will lie. for the L here presumes a jt damage. (S P).

In the case of a married woman her husband must join in the action for she can bring no in her own name alone (see visit e converso)

Libel.

Whatever words wd be actionable if spoken are clearly so when written. 3 Bl 126. Esp D 140. or 504.
But written slander is considered of a more aggravated kind than oral, it is committed with deliberation &c 3 Bl 126. 3 Bac 490.
Hence the first rule does not hold e converso. There are many more rules on this subject in the books Esp 504. 3 Bl 126.

Libel is any malicious defamation of any person dead or living, published by writing or printing & tending to excite resentment in the party, or tending to expose him to ridicule, odium, &c. 1 Hawk 193. 4 TR 128. 4 Bl 150. 3 Do 490. **Definition.**
But parts of this holds only of libel as a publick offence viz 1st the libel of a person dead & 2d tending to produce resentment.

All libels include a public offence. 3 Bl 125. 3 Bac 492. 498. tit. libel.

The genl rules concerning words spoken, apply to libels considered as a civil injury, this rule holds thus. for that written words falling within any of the four kinds of actionable words, are libels. but this is not true e converso 2 Wils 403. 3 Bl 126. Esp D 504. Str 898.

It is also true that those circumstances whh will justify words spoken, will in genl justify when written — so far as the civil action is concerned Bur 807. Esp D 505.

Libel.

An action will not lie for publishing a true acct of a trial in a ct of justice, by the testimony of a witness wh may be false & contain actionable words, for the proceedings of a ct are open. 1 B&P 525. 1 Esp R 456. 5 Do 1 Mar 8 TR 293.

In a civil action the truth of the words written is a justification. 1 TR 748. 4 Bl 150. Sal 253. 2 Tid 166. 11 Mo 99. Bull N.P. 9. (4 Bac 516. 5 Do 495.

But on a criminal prosecution, truth is no justification at C.L. for the prosecutn is not for the sake of the public; for its tendency to a breach of the peace. 5 Co 125. Stra 491. 4 Bl 150. 3 Bl 125-6. 2 Mc Nal 648.

Nor is the bad reputation of the person libeled a justificat. 7 TR 4. 2 Mc Nal 649.

We have a stat in Conn! that the truth of the words may be a justification in a public prosecution.

A libel must be published. — originally writing at another ~~request~~ dictation was a libel. Carth 405. 5 Mod 163. 2 Mc Nal 642. Only transcribing a libel witht showing it is no publication, but if it becomes public tho not proved to be published by the transcriber, it is suffi.

But composing & reducing to writing a libel is clearly a publication, tho he locks it up in his desk & it becomes public witht his consent. So procuring a libel to be written, reading it after a knowledge of its contents, handing it to another, sending it to another.

Affixing it in any public place. & in short to be wilfully & maliciously instrumental in making it public incurs the guilt of publication. 5 Co 59(b). 5 Co 125. 1 Hawk 195. Esp D 510. Dkay 391. Salk 418. 2 Bl R 1038. 2 M. Nal 643.

Sale by a bookseller or the sale of it by his clerk with his consent is a publication. & the sale in his store is primae facie evidence of a sale by himself 2 M Nal 644–5. 5 Burr 2687. Esp D 510.
So if a libel is published in a printing office, this is prima facie evidence vs the Editor. 2 B R 1038. 2 M Nal 643. 647–8. 2 Hawk 131.
Sending the writing to the press is a publication Esp 510. Fortesque 201.
Singing the libel is a publica^{n} 2 Burr 807. 5 Do 2666. 5 Co 125 b, Esp 510.
But repeating part of a libel in merriment is held to be no publica^{n} but the absence of malice must be very clear. 1 Hawk 196. 2 M Nal 643.

Writing a libel & sending it to the party libelled is a publica^{n}, for the purpose of a crime, but it will not support a civil action. 4 Bl 150. 1 Hawk 195. Poph 139. 12 Co 35. 1 Mod 58. Hob 62. 215.

Esp D 506. says writing a letter by way of friendly expostulation once held suff^{t} ground for public prosecu^{n} but this must depend on circumstances.

There is a third kind of slander wch is by figures as by hanging a person in effigy - or any representation by painting—

Declaration in these cases are set out with averments & innuendoes.

Trover.

This action at C.L. lay only in cases where one found the goods of another & refused to deliver them on demand or converted them. 3 Bl 152. 5 Bac 256.
(C.L. now lies in many other cases)

The action is derived from Westm 2d 13 Edw 1st. It now lies by fiction vs any one who tortiously takes the goods of another 5 Bac 257. Cro El 824. Cro J 50. doubted Dougl. 589. 1 Mod 31. Str 128. formerly not so. In these cases the force & arms are waived in point of form. otherwise an action on the case wd not lie.

And in genl in all cases in wh one who is by any means possessed of anothers personal goods, sells them, destroys them, or uses them witht right or wrongfully refuses to restore them on demand. 3 Bl 153. Bul 33. Cro El. 781. 5 Bac 256-7. in these cases this action lies—

The first instance of this action in its present form was in the reign of Edw 6th. but actions of a similar nature were brot in the reign of Hen 8th. The fact of finding is now immaterial, conversion is the gist— Finding is genly stated in Decy tho not always.—is not indispensable Dougl. 589. Bul 33. 5 Bac 295. 272. 2 Bl 913. o [illegible]
The manner of obtaining possession is but an inducemt finding of course not traversable, but the Deft may deny under the genl issue that he ever had possession of the goods.
4 [illegible]—

Trover

Conversion – Conversion is the wrongful aſsuming the diſposal of the goods of another as if they were his own. 6 Mod 212. 5 Bac 257. 2 Bul 280. Sid^a 264. therefore it is a tort.
The deft is by the form of the action always supposed to have taken poſseſsion lawfully. 5 Bac 256-7. Cro J 5. & 1 Bac 31.

The gist is the conversion & this may consis 1st In an unlawful takeing. 2d In the unlawful use. 3d In an unlawful detinue. The evidence of conversion in these cases is diff^t – to constitute a conversion there must always be a ~~conversion~~ misfeasance. Esp D 590. 5 Bac 288. 257. 1 Rol 6.

II A tortious takeing is per se a conversion in – & no demand is neceſsary. Esp 587. 5 Bac 257. 1 Sid^a 265. 7 BR 465. Esp 580. 3 Wils 146.
Treſpaſs in such cases is concurrent & is founded on the force. Trover waives the force as such i.e. it waives it quoad the form of declareing, but is founded on it as evidence 4 Bac 41.

III. By unlawful use. this supposes the Defts poſseſsion lawful. Eg using a thing found &c 5 Bac 257. 1 Bl 221. Cro El 219. for this is an unlawful aſsuming to dispose of the goods of another as if they were ones own. 5 Bac 257. When the takeing is not tortious there must be some evidence of an actual conversion (as vide following Egs – Esp 581.
1st A misusing propy entrusted to ones care – found &c 1 Bl 221. Eg carrier of a box of goods breaks it open or sells the box &c 2 Salk 655. 2 Buls 312. 2 BR 953.

Conversion.

So destroying them, as throwing paper found into the water. Cro El 215. 3 Bl. 153.
So by selling them. Bul 131. Cowp 419. 2 T.R. 444. 1 Do 387. 6 Do 697.

But if a bailee of goods destroys them, perhaps it is said is concurrent with trover. Co Lit 57(a). 5 Co 13(b). 2 Rol 555. 5 Com D 581. Mod 248. The bailment is extinguished by so wanton an act with bailt. According to Coke it shows an original intent to destroy them & so makes his poss. tortious ab initio — Drawing out part of a cask of wine & filling it with water is a conversion of the whole Esp 581. 1 Bl 221. Stra 576. this is a wrongful assuming &c. ut supra.

But neglecting the custody of a thing is no conversion Esp 580. 590 — is not a misfeasance. Hob 281. 8 Co 146. If a finder of cloth suffers it to be moth eaten. So if perishable articles are suffered to decay. Cro El 219. Ld Ray 409. 1 Bac 48. 1 Pow C. 252. Jones 252. Ld Ray 917. 5 Bac 258. Hob. 15. 1 Salk 165. 143. 1 Rol 2. 5 Bur 2827. 1 Bac 252. 5 Do 269.
Special action on the case here lies. Esp 590. Salk 655. Ld Ray 917. Pow C 252. Jones 48 Esp 581.

If a carrier looses the goods. trover lies not. Salk 655. no misfeasance. When liable for a loss for neglect. misfortune — or the act of a stranger. Case must be brot.

As timber being on B. land. A asked leave to take it. B refused. trover was held not to lie, no conversion, no intermedling. no misfeasance, 5 Bac 29. 255. 2 Bul 310. 2 Mod 245. 5 Bac 174-8. 2 H Bl 257-8.

Conversion Where the conversion consists in selling the prop. of another. indeb. ass: is concurrent with trover, 1 Bur 131. Cowp 419. 2 T R 144. 1 Do 387. 6 Do 697. to recover the money it sold for.

III. Wrongful detainer is a conversion as if bailee refuse, wrongfully to deliver on demand.
If there has been an actual conversion as by use &c demand & refusal are unnecessary to the right of action. Esp 589. 590. 1 Sidn 264.

But a refusal to deliver on demand is not itself a conversion for it may be justified. Eg plt does not show sufft evidence of ownership at the time of the demand. Esp 591. 2 Buls 312. Cowp 529. So deft may have a lien on the prop as innkeeper, carrier &c. 2 Show 161. 2 Ld Ray 752. Esp 582. 2 Bur 936. 4 Do 2221. So it may have been destroyed witht defts fault, or lost or stolen. 1 Atk 655. Esp 591. 5 Bur 2827. 2 Ld Ray 752. 1 New R 537.

Demand & refusal are therefore only evidence of a conversion Esp 590. 1 Rol 131. 5 Co 50. 2 Show 179. 3 Bl 153. Holt 187. & per se. only prima facie evidence. 10 Co 56 (b). 57 a. Esp 590. 3 Bur 1243. 2 H Bl 135-6 - denied 6 Mod 212. Moore 666. Cowp 529.
But if the refusal is not justified by D. the presumption becomes conclusive to the jury of a conversion.
But if the jury find only demand & refusal the Ct cant give judgt for pltf Esp 590. 10 Co 56. Q B C 97. 495. 3 Bur 1243.
This wd be a special finding but imperfect & a venire de novo would be awarded.

It has been doubted whether the finder may not keep the goods until his expences are paid &c but it is now settled that he cannot 2 H Bl 254. 2 Bl R 1117.
Where a servt. converts goods even for the use of his master by the command of his master the servt. is liable in trover 3 Wils 328. Ibid 813. Bul N P 47. Esp D 580.

In genl. any one may maintain this action who has an interest in the goods converted, the pltf need not have an absolute prop. 2 Rol 569. 1 Sidn 348. Latch 214. — Who may maintain this action.
Eg bailor in genl may have this action v him who converts the goods in the hands of his bailee.
But if the bailor had not the right of poss. at the time of the conversion not so — 7 T R 9. 4 Do 489. Ibid 480. 8 John 432. 2 B & P 329 n, 4 John 432 11 ib 385. 2 Ph. E. 133–4.

Again the bailee has this action & SG. thinks that evry bailee in all circumstances is entitled to this action, he has a lawful poss. 1 B & P 44. Peak R 44. 9 East 140. Esp D 577.
A common carrier, special carrier, agisting farmer &c &c. may have this action v the wrong doer.

If goods are sent from A to B. not to rest in B. [illegible] — 6 East 495.
are stolen, A may have an immediate action [illegible] the wrong doer —

Trover

Who may maintain this action.

Pltff who has taken goods &c can have this action. Ld. 282. Bul 33. 2 Saund 47. (n).
Indeed a mere lawful poſs or a claim of right with actual poſs gives this action vs a wrong doer. Hence a finder may have the action vs one who unlawfully takes them. (d). Stra 777. 505: 2 Saund 47.

A rightful poſseſsion implies always an interest. a special interest at least & a special int. is all that is necessary.
But this poſs. must be acquired either legally or under colour of title or claim of title 3 Wils 338. 2 Saund 47. (n) for poſs. acquired witht right & witht colour of right gives no special int. — eg thief can maintain no action of trover.

So a right of poſs at the time of the conversion is suffic tho witht actual poſs. 1 Bul 68. 1 T R 480. 7 do 9. Esp D 596. But a poſs of some kind is indispensable. As Pltf had sent an order to deliver goods to his servt & the merch delivered the goods to an innkeeper here pltf had neither poſs or right of poſs. secus if the goods had been delivered to the servt. 1 Salk 14. Bul N P 35 c. 3 P Wms 186. Esp D 596.

Trover is founded on prop in the pltf. treſpaſs is founded in poſs in the pltf. but as vs a stranger where original poſs is tortious, this distinction does not practically apply. The distinction holds in practice only when the defts originally poſs is lawful — here treſpaſs will not lie unleſs in case of a wanton destruction of the prop or for the defts poſs is lawful — but trover will lie —

Bul 25
7 T R 9
4 East 147

Who may maintain trover.

An uncertificated bankrupt may have this action vs a stranger 1 B&P 44. Peake R 140. 3 Esp 140. Peake 569.
An Ex'r or Adm'r &c could not maintain this action for goods converted in the life time of the testator, but by 4 Ed 3 de bonis asportatis, this action is given to Ex'rs vide Ld Ray Cro El 377. Esp D 589. Stra 60. Salk 168.
For the rules respecting bailors & bailees, see bailments.
1 Bl 65. 5 Burr 2645. [illegible] 15 [illegible].

In gen the returning of the goods to the plff after conversion does not oust the plff of his action, but merely goes in mitigation of damages. 6 Mod 212. Cro C 148. 6 T R 656. 2 Bl R 902. Esp D 581.
But if the conversion consists in a tortious taking & the Deft delivers the goods on demand & the plff receives them, the plff looses his right of action, for in trover the unlawfulness of the taking is waived, & the only conversion is the taking, & the subseq't receiving the goods destroys all damages. but in this very case trespass wd lie. 1 Burr 31.

When the owner recovers in trover it vests the prop in the deft except when the prop has been returned. Stra 1178. 5 Bac 257. Esp D 593. 1 Show 146.
A former recovery of judg't ~~vs~~ vs a stranger for the same cause is a bar to a subseq't action. plff can have but one judg't. Cro J 73. Esp D 593. Stra 1078. 2 Ld Ray [illegible].
This rule is common to actions sounding in tort gen'lly. in cont: judg't with't satisfaction vs one bars not the action vs another. Q. [illegible] will judg't without satisfaction bar any action. vide Gilb 68 n 1. 3 Wils 258. [illegible]
Again where trover & indeb ass: or where trover & trespass are concurrent &c a recovery in any one form of action is a bar to any subseq't action in diff't form. 2 Ld Ray 1217.
5 Bac 280. Esp D 593.

Trover

Against whom this action lies.

It lies vs the first wrongful taker & vs any subseqt holder, even a bona fide purchaser, (provided the goods are not sold in market overt). Stra 1142. 1 Wils 8. Salk 283. Atk 44. Esp D 575.
The exception regarding market overt is not known in Conn. But in Eng the sale in market is not good, unless a bona fide sale. 2 Bl 450. 1 Leon 158. Esp D 575.

Again, where the subject is money, or bills of exchange transferrible by delivery, bona fide purchasers are protected, this is founded on commercial policy. Miller v. Race. 1 Burr 452, Salk R 126. 2 Ray 938. 3 Burr 1516. Doug 611. 1 B R 485.
A parol gift of goods witht delivery does not vest any prop. in the donee, & if he afterwards takes poss witht consent of the donor, he himself is liable in trover, Esp D 577. 1 Bac 299. 2 Leon 30. As to the last position the donor must demand the prop. for the gift amts to a license wh will justify a taking.
So a pawnor may have trover vs the pawnee after tender of the amt for wh they were pawned.

But what is called (improperly) a symbolical delivery is sufft, Eg delivery of the key of a trunk in wh goods are placed. Stra 955. 1 East 192.

Tenants in com. & jt tents cannot maintain this action vs each other. Salk 290. 1 T R 658-9. Cowp 450. 1 Ray 301.
But if one such tent wantonly destroys the prop the other may maintain this action, for this cant be deemed the act of both. Co Lit 200(a). Esp D 586. 1 East 368. 365. B. 1 P. 34-9. 3 John R 175.

Trover.

Trover lies for any per chattle in gen — for choses in action & in this case the date need not be mentioned. Cro El 167 or 190. Salk 130. 283. 654. 2 T.R. 708. Carp 117. Esp D 543. 588. Cro El 723.

That trover lies for.

It lies also for a title deed. Esp D 543. 2 T.R. 70 8. 5 Mod
But in genl it will not lie for an animal ferae naturae unless confined & of value, 4 Bl 235. 1 Rol 5. Hob 283. Cro El 125.
When they are in a wild state of course no one can have any int in them (Ib).
But for tame animals this action will lie. Cro J 262. 5 Bac 264. (Quere — Will trover lie for a dog or goose? ☜
Hob 283

But this action does not lie for a negro slave & this was decided before Somersets case, for as regards his person no one has a right to it: the master has only a right to his perpetual service — The action in such case must be a special action on the case with a per quod.
2 Ray 146. 1274. Carth 399. 2 Lev 201. 1 Vo 336. (8 Rob 785).
The masters remedy is a special action on the case with a per quod servitium amisit —
Again this will not lie for the conversion of a public record the record cant private prop. but the copy of a record may be private prop. & trover will lie. Hard 111. Esp D 542. 5 Bac 264.
Formerly held that trover wd not lie for money unless in a bag &c but this is not now law. (Cro El 638. 681). 5 Bac 264. 1 Rol 5. Cro C 89. Cro El 818. 851. (Com D 375. 1 El. Balk 285. Bul 35. 130.
If the servt embezzles the goods — or loses it at play — the master may have trover — the proper action is indeb assumpt. Wils 124. Bul 33. 5 Bac 264

4 Trover

4 For things it lies. But trover lies for the conversion of personal chattels only, hence the severance of a thing from another's freehold is not a conversion of it, trespass must in these cases be brot. this holds of all fixtures. Cro El 129. 5 Bac 257.

So if one cuts & carries away with one continued act timber trees grass &c trover will not lie. But if one tortiously takes a thing already severed from the freehold, tho formerly affixed to it, trover will lie. Noy 125. 5 Bac 257. Thus it seems if I sever trees on one day & carry them away on the next trover will lie

If the goods of a freighter are thrown overboard to save the ship trover will not lie 2 Buls 280. 5 Bac 258. The necessity is a justification. But he whose goods are thrown overboard in such case, is by the maritime L entitled to average. a contribution will be made in his favor. Qu – Would a passenger be compelled to contribute ?

Declaration.

Pleadings. Some place for the conversion must be alleged but + this is now only to be reached by special demurrer, secus formerly. Cro El 78. Cro Ca 588. 2 T R 30.
The plff must alledge prop in himself Hard 111. 5 Bac 271. Stra 1029. 2 Saund 379.
It is com & almost universal to alledge demand & refusal but this can't be necessary, & even where the action will not lie with't a demand & refusal, these need not be stated for they are merely evidence of a conversion –

+ This action is transitory & the plff not bound to lay the true venue

Pleadings.

The time of the conversion must be alledged, the times of finding are genlly stated but this is not necessary. The omission of the time of conversion is now mere matter of form, secus formerly. Wentw 135: Cro J 428. Cro El 99. Esp D 588. 3 Bl 394.

The prop' converted must be described with convenient certainty. formerly the rule was much more strict. Wentw 114. 304. Esp D 587. & Ld Ray 99. 588. 1 Lev 301. 2 do 176. Sha 809. B. N P 33. Vide Trespass.

Espinasse says, the plff need not state the value of the goods but some value must be alledged. tho it need not be a true value, But the omission of value is aided by verdict. Esp D 588. 2 Lev 430. 5 Bac 275: Esp D 588. 409. Cro C 130. 147-8.

Defences.

It is said that a release is the only good special plea in bar, 1 Keb 305. 5 Bac 276. Esp D 592. But other special pleas have been allowed (Cro J 73. Sha 1078. Salk 654. & ought to have been allowed. eg former judgt — accord & satisfacn Stat of limitn — (JG says that any thing similar to a release may be pleaded specially)

The rule is that a justification cant be pleaded specially. for to plead a justification amts to a genl issue; conversion ex vi termini means a tort that cant be justified. a justification denies the conversion. Bul 48. Esp D 593. With this exception special pleas are as good in trover as in any other action.

In Cont no limitation in terms for the action of trover — but where trespass & trover are concurrent trover is within the spirit of the stat relating to trespass but our Cts have held contra —

Assault & Battery.

A bare aſsault is an attempt or offer to do a corporeal hurt act to another with force without actually touching the body, lifting a club, brandishing a sword, pointing a gun &c. Com. D. Bat C & D. 3 Bl. 120. 1 B. N. P. 15. [illegible] 1 Hawk 133. 1 Vent. 256.

An aſsault is called an inchoate violence, & is a wrong even tho no actual hurt is sustained 3 Bl. 120. 3 Reev. H. E. L. 55.

But to make a threatening act an aſsault in L. a hostile intent must accompany the act. Eg if A. took his sword & brandished it, & said if it were not assize time I wd not take such language. Mod 3. 1 Bac 154. 1 Mod [illegible]. 2 Keb. 545.

But a battery cannot be thus explained by words. words never amt to an aſsault— much leſs a battery—
1 Hawk 133-4-2 Rol 545; Bac

Formerly held that threatening words might make an aſsault. 1 Hawk 133-4. 2 Rol 545 1 Bac 154. but not so now.

A battery consists in the actual doing of violence to another & the least degree of violence if in an insolent, rude, angry manner is a battery. Where the violence is merely nominal the manner of committing decides whether it is a battery or not, but where the violence is not merely nominal, the manner can't make it leſs than a battery. 6 Mod. 149. 172. 1 Hawk 134. 1 Bac 154.

Bl. says that a battery is the unlawful beating of another but this is incorrect. the word battery does not eq in termini mean an unlawful act. 3 Bl 120. Salk 407.

Assault & Battery

Every battery includes an assault so that proof of a battery will support the allegation of an ass & Batt. 1 Hawk 134. Salk. 384.

Menaces of bodily hurt are in some cases actionable injuries tho they cannot amt to an ass. when they occasion an actual damage they are actionable the special damage is the gist of the action. The action however is trespass vi et armis tho it ought on prin to be case— 3 Bl 120. Com D. Bat. & C.D. 2 Rol. 545.

For what injuries Ass & Batt. lies.

To entitle to a redress for a battery the injury complained of must have been the immediate effect of the force employed. Eg the master's action for an injury to his servt is on prin in case & is indeed in fact case tho in form it is vi et armis — vide trespass on the case— But the injury need not have been instantaneous if the injury is produced by a direct chain of causes & effects it will support Ass & Batt. 1 Wils 403. 3 Bl R 892. Stra 634) Eg stabbing with a sword, here the injury is instantaneous — but if A throws an elastic ball & it bounds & rebounds until finally it injures B. here the injury is not instantaneous — but it is suffy immediate.

If A pushes B. vs C. C may have ass & Batt vs A. Bull N P 16 Esp. D 313.

If a horse with a rider upon him take a sudden fright & runs vs C. the rider is not liable, i.e. not prima facie liable for he is not the cause of the battery.

But if one wantonly strikes a horse on wh. P. is riding & injures P. or A.B. the person strikeing is liable in vi et armis to P. or A.B. this is on the same prin as the ball (supra) Buller contra being certainly incorrect. the horse is a mere instrument, just as if one shd put a stone in motion down a hill &c— 4 Mod 405. or 505. 1 Do. 24 Salk 637. Espd 313. Bul N.P. 16. 3 Wils 304. 9 East 523.

If one turns a mad bull into the street & injury is done to any person, aslt. batt lies (S.P.)

Excuses for Battery.
As. Consent.

When one receives bodily hurt from an act to wh. the party injured consents, he is in genl. entitled to no remedy. The distinction in the books is that if the consent is to an illegal act the action lies. Espd 313. 1 Bac 154. Bul N.P. 16. 2 Lev 194. This distinction is denied from a dictum in Comb 218. Ex. If A agrees to play at cudgels with B. & is injured he has no remedy for this is lawful. but if it were boxing secus— for boxing is unlawful. but J.G. thinks that this distinction applies only to an indictment & that the party injured can never recover. volenti non fit injuria & where the act is illegal he is particeps criminis.

It is again said that if one gives another authority to commit a battery this is no justification. but J.G. thinks that the injured party cant have his action tho an indictment in such a case would witht doubt lie. Bul N.P. 17. Espd 313. Lanes 125. Comb 218.
It is a justification to this action that the injury happened in an amicable way— as by wrestling—

Aſsault & Battery

Excuses for Battery

It is not neceſsary for the maintenance of this action that the injury sh'd be wilful, if committed thro negligence, indictment will not lie. tho a civil action will a damage is committed & the person doing it must suffer rather than the other. 2 Bl R 896. Ray 468. but the intention will always have an effect on the amt of damages

Hence an ideot, lunatic. child of any age is liable civiliter for a battery. one instance is a child of 4 yrs of age. Latch 13. 110. Doug 640. Hob. 134. 1 Fonb 181.

Nothing leſs than inevitable accident will excuse one who by his own act has injured the person of another. 9 Wils 377. Hob 134. 2 Bl R 896. 9 Wils 410. Stra 596. 1 Fonb 81. Inevitable accident is that ws with human strength or care can't guard. Eg A is pushed ag C. A is not liable or A taken with a fit falls upon B.

But if A in firing at a mark hits B. A is liable. 2 Bl R 896. Ray 469.

Buller says if a horse used to running away, runs away with the rider & injures another the rider is liable, for here is imprudent negligence. but here T. G. thinks that the rider does not commit the battery & the action sh'd be case. Bu N.P. 16. Ventr 295.

If the act causing the injury is voluntary aſst & batt. lies tho the injury is not voluntary. But when one without acting for himself becomes the involuntary instrument of injury to another, in genl no action lies - but never Aſst & Battery -

some have supposed that where the causing the injury is lawful & where there is no negligence, Aſst. batt. does not lie. but there is no authority for this rule. Esp D. 599. 317. 313. B. N.P. 15-6.

But Esp says a treſpaſs of any kind to be actionable must be voluntary. but this can't be law — he cites 4 Bur. 2092. but he has wholly mistaken the case, the injury was to deer from the Defts dog. here the act is not the act of the deft unleſs the deft was guilty of some neglect.

Where the act causing the damage is itself unlawful the author of it is in some way liable for all the injurious consequences, but in what form vide treſpaſs on the case. The circumstance that the act is illegal makes no difference with the form of action it is no criterion at all. the form is determined by the circumstance of the injury being the immediate consequence of the act done or not. 2 Bl. 893. Ld Ray 1401. 1399. 12 Mod 639. Kent 295.

An offr having a proceſs of arrest in Cr. may use all neceſsary violence, even to the taking of life 1 Hawk. 130. Esp 314. 1 Bac. 155. — Justification of battery.

But a battery is not justified on a mere right of arrest unleſs actual resistance is made. or unleſs the deft attempts to escape, witht these the off. may merely molliter manus imposuit. 2 Stra. 1049. Ld Ray 229. Bul 18-19. ~~Esp D~~ 319. & 3 R 78. 299. 9 D. R. 523. 3 Lev 403.

Justification of battery

But a justification of a molliter manus &c is no justification of the battery. the battery sh^d be denied.— many authorities to the contrary, but these are contrary to prin & to the modern opinions. Cro El 93-4. 2 Ventr 193. Skinner 387. (1 Saund 296. (n 11).) 1 Ray 231. 3 Lev 404. 2 Bl R 520. Bul 17. Stra 1049. Com Di pl 3 m. 16. Pleaders Assistant.

Where the decla^n charges battery & bruising it is clear that ~~as~~ a mere right of arrest is not suff^t, here he must clearly deny bruising, or plead specially that resistance &c was made &c— 8 T R 299. 1 Saund 296.

A person may justify a battery in his own self defence. If then one strikes or merely assaults me I may return the assault or blow— with other blows. Bul N P 17-8. Bl D 315. According to one book in such case the deft. sh^d plead not guilty as to the force & arms, but clearly wrong— (pleadings assault) 1 Saund 295. 296. n 1) Cro El 262. 1 Hawk 130. 1 Sid 246.

But to make out this justification there must be some reasonable ~~xxxx~~ proportion between the ass^t & the defence. In strict theory of l. the person assaulted may use just so much force as is required for defence, but much more force is allowed & ought to be allowed. The ques concerning the reasonableness of the force used in the defence used is for the jury to determine— 1 Mod 43. Bul N P 18. Salk 642. 1 Sid 246. Bl 315.

But if from a sleight ass^t by it a scuffle ensues & A is mayhemed B is justified—

Justifications of battery.

The words of this plea are son asst demesne Salk 642 Esp D 315. Plea ass 447. 2 Chit Pl 523-4.

But it seems that mayhem is not justified by the Pltfs aggression unless that aggression might have been to the danger of the Defts life or limb. 1 Ld Ray 177. Esp D. 315. 11 Mod 43. Salk 642. This is a rule of strict L. but can't be enforced in practice.

To this plea there is a genl replicaⁿ de injuria sua propria abs tali causa. This denies the pltfs first assault, 8 Co 66. 1 B&P 76. & denies the whole plea of son asst 2 Chit Pl. 642.
Again where the pltf is the blameable cause of the battery tho he committed no asst or battery on the deft yet in some cases the Deft is justified. 1 Ld Ray. 177. Salk 642. Cro J 366. Esp D 315. 11 Mod 43.

A parent is justified in reasonably correcting his children, school master his pupils, jailor his prisoners. 1 Hawk 130. 1 Saund 176-7. Esp D 315. B & P. 18. Master may also chastise his servant,—but these must be domestic servants—
And formerly a husband could chastise his wife, but the Law now seems to be difft. tho the L has not been judicially overruled, 1 Hawk 130. 1 Bac 155.

One may justify a battery in defence of his wife, parent or child, husband &c & here the prin. & the rules are the same as in self defence. 1 Ld Ray 62. B & P. 18. Esp D 319.

Justification of battery. Servt may justify a battery in defence of his master & the better opinion is that a master may justify a battery in defence of his servt. Bul N.P. 18-9. 2 Ray 62. 2 Rol 546. Salk 407. 1 Bl 429. vide master & servt. 3 Bac 568.

But in these cases the battery must be alleged to have been in defence of the wife or child &c. the law will not allow any vindictive retribution. 2 Ray 62 (n). Esp. D 318. Stra 953. And the proof must accord with the allegation the battery must in proof appear to have been in defence of parent &c

One may justify a battery in defence of his prop. when forcibly invaded. but where there is nothing more than a nominal violence on the part of the plff. the Deft can't use violence witht a previous request to the wrongdoer to depart Salk 641. 1 Hawk 130. B.N.P 19. ~~Esp D 314~~

In case of a mere entry on another's land the battery must it is said be justified not as a battery, but as a molliter manus imposuit. B.N.P. 18-9. 2 R 62. Salk 407. 1 Mod 36. 2 Ch P 524. (n). Com D. Pl 3. m 15: 1 (8 T.R. 78) If this rule is correct the land owner may after request only push or press the wrong doer out.

Defence of land. These rules suppose the owner to be in possession of his prop. at the time of the violence, & are founded on the right of defending possession. But where the owner is disseized or out of possession, the person out of poss. may not regain poss by force, Stats 5 Rich 2. &c have made this rule wh at C.L. was such that he may gain poss. of his own land by violence 3 Bl 179. 4 Bl 148. 2 Bac 555. The owner must enter peaceably. We have a similar stat in Connt

These stat^s contemplate cases however in whh the owner has in some measure abandoned the possession, as vacant poss. or holding over by tent^.
But a casual or temporary absence from ones prop does not prevent the owner from putting the disseisor out with violence (Id 6).

In case of personal prop. poss can't be regained by force except in case of felony, tho the owner may defend his poss with violence. 3 Bl 4-5. 2 Rol 565-6.
Provocation by bare words never justifies a battery, tho it may mitigate damages greatly. 1 Wils 6. Esp D 317.

A serv^t can't justify a battery in defence of his masters goods Cro El 242. But the rule means, that he cant justify merely because they are his masters, but if they were in the special keeping of the serv^t without doubt he may justify a battery in defence of it. Any bailee may do it.

If A should beat B. today tomorrow &c this battery cant be laid in one count with a continuando - nor as having been committed at diff^t days & times, because one ass^t is one entire indivisible act Cowp 825. Esp D 416 5 East 395. 1 Bl Re 134. Declara^n

But the pltf in the same declar^n in diff^t counts may allege as many batteries as he has to complain of.

Assault & Battery

When an action is brot by husd & wife for a battery commi[tted] on her it shd be ad damnum ipsorum for the damages survive. 2 Ray 1208. 1 Sid 387. Esp D 316. 1 Rol 789.

The pltf may lay in his declaⁿ many facts for whh he cannot himself recover as that he beat his servts & he may prove them, this it is sd he may do for the purpose of aggravating damages. but in truth he does it to shew the enormity of the battery on himself. 1 Salk 642. Esp D [illegible] 317. 2 Ch Pl. 374 n 1

Pleadings. By the C.L. every justificaⁿ must be specially pleaded. Co Lit 282. b. Esp D 317.
under our stat justificaⁿ may be given in evidence under the genl issue — but by a rule of practice must be given in evidence for the purpose of mitigating damages.

But facts whh if specially pleaded wd have barred the action as a justificaⁿ, may be given in evidence under the genl issue, to mitigate damages. Esp D 317. Rule diff in slander quoad the truth of the words spoken. but the rule here laid down appears to be correct.

When the Defts plead a justificaⁿ he must in that plea confess the battery. or the pltf may pray the Ct to disallow the plea. 1 Salk 637. Esp D 318. 2 Ch Pl. 523. 545.
This rule as laid down misleads the student. The rule means merely that the justificaⁿ shd not amt to a denial of the battery. It does not mean that in terms the deft shd say. "I did commit this battery." It seems to mean nothing more than the deft shd not plead, specially as a justificaⁿ that whh amts to the genl issue —

If the Deft pleads son ass^t demesne the pltf may justify that ass^t & if he does he will be entitled to recover. but this justifica^n of this first ass^t must be specially replied (Esp. D. 317.) It can^t be given in evidence under the gen^l replication de injuria sua propria &c.

Matter of mere excuse it is said may be either pleaded or given in evidence under the gen^l issue e.g. that the battery was by inevitable accident. Bul. 17. Salk R. 637. 6 Mod. 484. Esp. D. 317. 2 Ch. R. 519. Mr Chitty says that the excuse must be pleaded specially, but the excuse of inevitable accident ought Ld. G. thinks to be given in evidence under the gen^l issue – the excuse that the battery happened by amicable contest ought Ld. G. thinks to be pleaded specially – So that no gen^l rule can be laid down as to excuses.

Where the Deft justifies with a molliter manus the pltf may reply – son tort demesne absque ~~[illegible]~~. tali causa. or he may plead specially traversing any one material part in the plea

Or he may reply that the Deft committed an outrageous battery absque hoc that he molliter manus imposuit – Com. D. Pl. 3 M. 16. f 20. & Co 67. 1 Bur. 320. Hob. 321. Lawes on Pl. 156 –
The pltf in his proof is not confined to the time laid in the declara^n & the pltf may prove a battery prior to the four years limitations. unless the Deft pleads the stat. But with us the Deft may plead not guilty & give the stat in evidence by our statute evidence – (Swan vide Conn. R.)

Pleadings. On the other hand a special plea must cover all the time within wh the pltf can prove a battery. thus if the pltf alledges a batt on the first of Augt & the Deft pleads a justifican on that day, he must in genl also plead absque hoc, that he has not been guilty on any other day — (vide see pleadings) Hob. 105. 1 Ld Ray 229. 2 Saund 295. Esp D. 321. 315. 415. Bull N.P. 17. Cro Ch 228.

But it is sd that if deft pleads son asst demesne, on a particular day, he need not conclude with a traverse of absque hoc that he is not guilty on any other day, for if an asst on that particular day is prima facie good evidence for any other day. Bul. 17. Plead Ast 447.

Again the plea must be as broad as the declaran as to the subject matter of the declaran or it is bad in toto. Eg. Pltf alledges asst & battery & mayhem. & the Deft pleads a defence good in L as to the asst & battery, but not as to the mayhem. this plea is bad for the whole & the pltf will recover for the asst & battery as well as the mayhem. Cro El 268. Esp D 318. Plead asst 447.

Son asst demesne covers the whole declaration — a molliter manus will justify only an asst & battery — but not a mayhem —

In justifying a batt in defence of Husd wife parent &c the act must be alledged to have been done to prevent an asst on the wife, parent — child &c & must alledge the necessity of the interposition. 1 Ld Ray 62. n) 2 Rol. 546 Stra 953. Esp D 318.

A recovery of damages for the same batt either vs the Deft himself or vs another, is a good bar to a subsequent action. Cro El 30. Cro J 73-4. Yelv. 68. Salk 11. Esp D 319. 416. Bul 20. (held that if the judgt is not satisfied it is no bar. but G. thinks this incorrect)

Pleadings.

And this rule holds tho further damage shd have accrued after the action first brot. for the batt is the gist of the action Salk 11. Esp D 319.

So if the pltf had given a release & subsequt damage shd accrue the rule wd probably be the same. Chittenden v Blayden.

If the injury is done by several, the pltf may sue one or all, or part 5 TR 657. Esp D 319. A release to one is a discharge to the whole Hob 66. Esp D 415. But where several Defts are sued together & a recovery had vs them all. it has been a ques. how far a jury may sever in damages. & if they do can the pltf have judgt for all.

Severance of damages.

It is a genl rule if two or more are sued jointly & found jointly guilty it is clear that the jury cannot sever in the damages. for each here is guilty of the whole trespass 5 Bur 2790. Carth 19. 11 Co 5. Jenk 319. Cro J 118. Esp D 321. 420.

So if judgt goes vs all by default the rule is the same the default is an admission that they are jointly guilty of the trespass. Stra 422. Esp D 420.

But by some, if the defts both plead & sever in their pleas the Stra 99. jury may sever in damages. if both pleas are found vs the Defts 2 Stra 1140. Esp D 420. This opinion appears to Rg. incorrect. If the issues are both found vs the defts. they stand on the record both guilty & the weight of authorities is vs the rule Cro El 860. Hob 66. 11 Co 6. 7. Bul 20. Cro C 348. or 357. Carth 19. 1 Saund 207. (a). 5 Bur. 2792. Cro J 118. Stra 910. Cro C 384.

Pleadings. But it is said that the jury may find one deft guilty of one part. & another of another part. & then that they may sever in their damages Cro El 860. Str D 420.

But this rule is denied in its full extent. & justly denied

And this case can occur only in one case where A commences a battery & B afterwards comes in & continues the battery agst A. 11 Co 5. 7. Cro $\overset{Ch}{\underline{El}}$ 54. Bul 21.
This rule is true, for if they could be joined in one action they must be jointly guilty of the whole except in the one case stated above

If in cases where the jury ought not to sever damages they do sever, the plff cannt have judgt for both assessments but he may set aside the verdict. & have a venire de novo. & if judgt shd be rendered for both assessments it wd be erroneous. 11 Co 7(a). Carth 19. B N P 20.

But if the plff pleases he may remit one assessmt on the record & take judgt of the other & this is called taking judgt for melioribus damnis. & he may take this judgt vs both or vs him only vs whom the better assessmt is made Carth 20. Saund 207. (a, n) 6 T R 199. 200. B N P 20. Cro El 239. 243.

Or the plff may enter a nol: pros: as to one & take judgt vs the other alone (Id).
But in all these cases in whh the damages ought to be entire the plff can only have one Do n. 11 Co 7 a. 5. 5 Bur 2791. Carth 19. Cro J 118. Str D 321. 420.

Pleadings.

And where there is an improper assesmt & the pltf does not remit or enter a nol pros &c the Deft may move in arrest of judgt, or the pltf may move in arrest of judgt if he chooses. & in either case a venire de novo will be awarded. Cro. C. 173. 176. Hob. 70. Carth 19. Bul 20.

In Eng it has been holden that a nol pros or non suit before judgt as to one of several Defts discharges the action as to all. Hob 70. This is not now considered as L in Eng. Saund 207. 3 Lath 571. 1 Wils 90. 306. 2 Ray 597.
In Eng & in Conn. the Ct will give the pltf leave to strike the name of one of the several Defts from the declan & then to proceed & call him as a witness — So he may strike out more than one —

Where one deft wishes for the evidence of a Co deft. it is a rule that if there is no evidence the codeft he may be sworn. pltf may have included him for the purpose of preventing him from giving evidence. But if there is any evidence agt him he must be tried before he can testify. But the Ct may admit a verdict ~~a verdict~~ to be first taken as to him & if he is acquitted he may be sworn. He is then not interested. Bul 285. 2 Bal 284. Sidn 441. (Contra Ph. Ev 61-2. Cl. (n d 2 Root 282.)

The jury may if they please vary from the declan & find only a part; as guilty of the battery, but not of the wounding. This is true of actions of trespass in genl. Esp 481. 2 Rol 684. Cro C 94. 54. The jury can't be bound to find Deft guilty of all wh is charged agt him.

Assault & Battery.

Pleadings The increasing of damages by the judges super visum vulneris is never practised in this state & probably is not here Law = secus in Eng= Esp D 322. 1 Ld Ray 176. Latch 223. 3 Bl 332-3. 1 Wils 5; Bull 21.

In this and other actions the jury cant give more damages than the plff demands. but the plff may remit the excess & take judgt for what he demands but judgt is erroneous if rendered for more than the demand— Cro. C 249. Esp D 420. Carth 21. 10 Co 115(b). 1 Ld R. 642.

Every Asst & Battery is said to include a crime as well as a private wrong. 1 Hawk 134. 3 Bl 121. 4 Do 45. 1 Bac 156.

This rule is too broad, this is not true of accidental batteries the accident is an excuse for the public offence tho not for the private wrong unless tht is inevitable = nemo fit reus nisi mens sit rea= 4 Bl 216.

In Connt we a Stat respecting secret batteries the party thus secretly beaten may bring a qui tam information accompanied with a criminal capias, & the proceeding is criminal throughout, & the person beaten is a good witness—

If judgt goes ag two or more Defts & one of them is compelled to pay the whole ds he cant compel either of the others to contribute— Kirb 111.
Otherwise in case of debt on contract—

Trespass for false Imprisonment.

Every violation of ones right of loco-motion is false imprisonmt & the restraint may be in a house or in the streets &c. 3 Bl 127. Esp Dig 326.

The requisites to the wrong are two. *first*, that there be a detention of the person. 2d that the detention be unlawful & the unlawfulness consists in the want of authority to detain. Authority to detain the person may arise *first* from legal process. 2d from some special cause witht legal process which warrants the detention. Salk 408. 3 Bl 127. Esp D 333-4. 5 Bac 169.

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There is one species of unlawful detention for wh this action never lies. that is where the crew of a ship are illegally captured as a *prize*. for this wrong is cognizable only in the admiralty Ct. Doug 572 (n).

But evry arrest of the person for a civil cause witht civil process is unlawful 5 Bac 169.
But a private person is not guilty of false imprisonmt in assisting an officer in executing a civil process. 2 Rol 561. 5 Bac 169.

The most frequent cases of false imprist are under void process.

A *Judge* of a Ct of record of genl jurisdiction is not liable at all for any judicial act whether done through mistake or malice if he confines himself within his jurisdiction - for no proof will be admitted in such case *is* the violent presumption of such a judges jurisdiction. Such a judge can be punished only by removal from office. 12 Co 23-4. Salk 396. Camp 172. 1 TR 503. 534-8. 513. 2 BR 1141.

+ Any person witht warrant may arrest a felon - & he is guilty of false imprisonment Esp D 333.

False Imprisonment.

Judges &c. of Courts of Record when liable.

&c. If then tres. or other action is brot vs such a judge - criminal or civil it is a decisive bar that he acted as a judge of record & of genl jurisdiction.

I. Reason is that such an exemption must exist somewhere in every regular government for there must be some rank than wh none can be higher.

II The policy of the L requires such an exemption.

But if a Ct of record even of genl jurisdiction has not jurisdiction of the subject matter of the process the Ct is liable, it does not act judicially, the whole proceeding is coram non judice & void; quoad this particular case they are not judges, they are mere individuals. 1 Hawk 86

Cts of record of limited jurisdiction are liable if they transgress their authority even by mistake. Eg Peer of the realm is arrested in a civil cause of wh the Ct have jurisdiction the Ct are liable in false imprisonment. here they do not transgress their jurisdiction but they do their authority. Eg Again, they imprison a man who is liable only to a fine. But in these cases a Ct of genl jurisdiction wd not be liable 6 TR 412. 2 Bl R 1145. 1 Salk 396. Stra 993. Esp D 391. & C 114. Here the same necessity of exemption does not exist; it is necessary only in the highest order of Courts.

By a Cts exceeding their jurisdiction, I understand its deciding or acting, or deciding in a case where it has no legal right or authority to act or decide at all.

But exceeding its authority means the Ct exercising some power wh it has no right to exercise. in a case however over wh it has a right to act & decide

But Cts of record of limited jurisdiction are not liable even for their malicious acts if they do not exceed their authority. As if having cognizance of a cause, they inflict an unreasonable high punishment or if they shd decide agt evidence. Or shd wilfully do so; for in these cases there is no excess of jurisdiction or authority. Salk 396. Esp. 326.

But Cts not of record as justices of the peace in Eng are at C.L. liable not only for malicious wrongs, but for mistakes in judgt even tho acting within their jurisdiction. Stra 411. 10 Co. 276. or 377. 1 Bl C. 354. 1 T R 536. 1 Bur 595. Esp D 338.
But this rule is now greatly mitigated by Eng. stats & besides the Ct of B R in its discretion will not grant a complaint agt a justice. 1 T R 653. Esp. 338.

In Conn. justices of the peace are Cts of record so are County Cts, & of course the Sup. & Supreme Cts. – the Cts of probate are not Cts of record.

Any Ct from whose judgt a writ of error will lie is a Ct of record, tho this is not true e converso – Eg Supreme Ct

It is said that any Ct wh has authority to fine & imprison is a Ct of record, but this was denied to be true by Ld Ch Justice De Grey. 2 Bl R 1146.) 2 Ld Ray 467. Salk 200. Carth 491. 3 Bl 24-5. 12 Mod 386.

Persons exempt from Arrest. An Exr or Admr cant be arrested for a debt due of the testator or intestate, unless there is a suggestion of devastavit & if an Exr be thus arrested, the pltf & atty if instrumental in causing the arrest are liable in false impt & the atty in genl is liable when instrumental in procuring an illegal arrest. 3 Wils 368. 2 Bl. R 1192. 3 Wils 345. 377.

Witness or any Ct of justice are exempted in going to the Ct, in the Ct & in going from the Ct. 2 Rol 798. 1 H Bl 636. Same of the suitors in the Ct. — 4 Bac 222
And this exemption of witness & suitor extends to his horse baggage & the money which he carries 2 Rol 273. 4 Bac 222.
In these cases however by the Eng practice the arrest is not in the first case illegal for the officer cant be supposed to know & is not obliged to take the Defts words. But the Ct immediately issue a supersedeas to the shff & if the shff after this detains the prisoner he is liable in this action. 8 T R 534. 4 Do 377. 2 Bl R. 1113. 1142. Cro J 379. Doug 649. 652. Comp 9. 6 Co 52 b.

In Connt the usual practice is for a suitor or witness when apprehensive of arrest to obtain a writ of protection from the Ct & on the production of this writ the shff must release him or he is guilty of false impt But when this is not done, the case is the same as in Engd.

But in these cases the illegality of the arrest does not defeat the writ on which the arrest is made. 1 Rol 220. 2 Bl R. 1193.

But this privilege is disallowed in case of collusion & if one a witness merely for the sake of getting fresh air. So if one attends as a suitor, where there is no suit. 2 Bl R 1193. 1 Mod 79. Cowp 9. 1 H B 636.
Pltff in a vexatious suit is not thus exempted—
Discharge from an arrest in this case is sd to be discretionary. 1 H B 636. But this rule appears to be untrue or at least of extremely narrow extent.

And in all cases where one attends under pretence merely he is not thus exempted—
This is not the privilege of the witness or suitor but of the Ct that justice may not be impeded.

Same rule of exemption extended to witnesses &c in an arbitration under rule of Ct. 3 East 89. Peake Ca 193.

Members of the Legislature — of Congress — Electors in going to & from the polls are exempted.
But in ~~no~~ none of these cases is the action of false imprisont maintainable unless the Deft has evidence of his title to exemption with him in such case. the only remedy is by Hab corpus—

In Eng certificated bankrupts & peers are not liable. but in these cases the off is never liable, if he arrests them, he is bound to obey the writ, but the pltf is liable in an action on the case. for illegal use of legal process. but he is not liable in false imprisont. 2 Bl R 291. Esp ~~D~~ 530. Dougl 646. 11 Co 76. (b).
Where a person makes an unlawful use of legal process. case must be brot for the act done is the act of L—. but secus if the process is illegal—

False Imprisonment

If a jailor detains his prisoner for fees after Deft satisfied fees, not liable. he has a lien. but if after fees pd the jailor detains for other expenses of board &c he is liable. 5 Bac 172. 1 Root 157. 1 Vent 237. 1 Pow Con 173. 1 Mod 132. Plow 68.

Where the order of Ct is to confine a person in a certain prison confinement in any other place is false imprisonmt. he can indeed be confined before commitment, as over-night &c, & if the order is genl he must be confined in the common jail. Hob 202. Latch 16. Salk 408. 3 do 219. 5 Mod 295. 1 Selw 318.

A peace off may arrest witht warrant on reasonable suspicion Doug 334. 345. 1 Mod 43. 4 Bac 517.
But a private individual who arrests witht warrent is justified if the person arrested is guilty, secus if not guilty. But this rule is not precisely correct, if a felony has been actually committed on reasonable suspicion a private person witht warrant may bring the person suspected before a magistrate. Doug 345. Esp 334-5. 1 Root 66. 5 Bac 171.

So also a private individual may arrest witht warrent to prevent a breach of peace or to prevent an escape. 1 Bulst 150. 2 Hawk 82. 1 D 136. 1 Bac 171.
Arrest on Sunday at C L is good, otherwise by stat. 5 Mod 95. Watk 78. 1 T R 265. 2 Bl R 1195. Esp D 327. 605. 2 Bulst 72.
But then stat extend in construction only to original arrests & civil actions.
Special bail may retake on Sunday & on Sunday commit for taking by bail is in L merely recaption. Salk 626. 3 D 148. Esp D 605.

False Imprisonment.

This is not allowed in favor of bail to the shff. 2 Bl R 1273.

Special bail may on a bail piece retake prin in another State or witht bail piece, tho the bail piece is convenient yet it is merely evidence. This ques is now settled, tho formerly much doubted, 7 Johns 145. 5 East R 172 (n).
It had been before decided that an off under an escape warrant. Root, might retake the Deft in another State. In this case the Gov of Rhode Island backed the warrant but the act of the Gov was merely void & the warrant had no effect but the off had a right to hold & retake wherever he found even in Greate Britian—

Arrest by breaking outer doors &c of the mansion house of deft in civil cause is void, & the arrest of course false imprisonm^t. 5 Co 93. Cowp 1. Hob 62. 2 Mc Nall 489. 2 Bac 367. vide shffs & jailors—

If an off having a process of arrest vs A mistakes & arrests B. he is liable in false imprison^t 2 Rol 552. Doug 42. Hard 323. 2 Rol Esp D 328.
But it is s^d that if B. had deceived the off by declaring himself to be A. & is arrested still the action lies. Esp D 328.
But B. is the faulty & criminal cause of the trespass & therefore on no prin can he maintain the action. 2 Ray 177. Salk 642

By our L if shff arrests Defts body on mesne or final process, when the Deft offers goods in satisfaction suff^t to satisfy the demand, the shff is guilty of false imprison^t (civil process). This is a stat rule. 1 Root 120.

False Imprisonment.

A feme cov^t can^t in gen^l be held in custody under an arrest on mesne process. she is merely kept under an arrest for the purpose of entering common bail. 2 Stra 1272. 1 T.R. 486. 1 Bl. R 420. N.B. vide Husb^d & wife –

Arresting & confining one for a reasonable time on charge of a crime under a parol order from a magistrate for the purpose of examination is a legal arrest. 5 Bac 172. 1 Root 166. Moore 408. Cro El 829.

And any individual may with^t warrant confine for a reasonable time &c a person deranged in mind & who seems disposed to do mischief. 5 Bac 172.

Liability of off executing a void process. If an off under the authority of a Ct of limited jurisdiction makes an arrest on a process from the face of wh it appears that the Ct have not complete jurisdiction, he is liable from whatever cause the want of jurisdiction arises, whether from personal privilege &c. Hard 480. Bul 82-3. Cro D 321.

A defect of jurisdiction is first, of subject matter of the suit 2^d it may arise from a privilege of the Deft exempting him from being sued in that particular Ct, & 3^d It may arise from the fact that the cause of action accrued out of the local limits of the jurisdiction of the Ct.
One case in wh it is held that if the Ct have jurisdiction of the subject matter, this is suff to justify the off. Ld Ray 230.

Arrests &c under void Process.

In the Marshalsea case it was held that where there is a want of jurisdiction of any kind the off is liable, tho the defect does not appear on the face of the record this refers to authority from a Ct of limited jurisdiction. 10 Co 76-7. Cro J 314. Esp D 337. 2 Wils 385. Esp D 388-9.

This rule wh is merely a dictum is denied in three cases by Ld Holt &c. They dare not deny the rule to be L. tho it is a hard rule & perhaps is not L. Stra 710. 993. Ld Ray 231. Stra 509.

These rules apply to Cts of limited jurisdiction. By other opinions if such Cts ie Cts of limited jurisdiction, have cognizance of the subject matter, the off is justifiable unless the defect appears on the face of the process. Cowp 20. 2 Mod 196. Esp D. 391. Hard 480. Carth 274. Stra 710. Bul 82-3.

But an off may justify under the process of a Ct of genl jurisdiction, unless the defect of the jurisdiction goes to the subject matter even tho the process is void independently of the jurisdiction. by reason of the high authority of these Cts. even tho void on the face of the process yet the off may be justified. 8 Co 76. (b) 6 Co 54. (a). 3 Wils 345.

In Comt an off is justified in all cases by his process unless it is void on the face of it. Kirb 110. 182.

Tho the process within a limited jurisdiction will within the distinction taken justify the off but yet the Plff is liable in cases where the off is excused by his process. Cro J 314. Esp D 330. Bul N P. 83. Mente 369. 2 East 260.

Arrests &c under void Process.

But according to the single case in 2 Ld Ray 130. (Kirb. 111. the off is not liable & in this case it was held that the pltf was not liable.

In some cases process is void & the pltf. (ct.) & Ct may be liable for an arrest under it, where the Ct has complete jurisdiction.

II. In Cts of limited jurisdiction where the authority is given by stat. if the authority are not strictly pursued the authority & the Pltf. & Ct in genl are liable for an arrest under it. Eg Ct commits under the game laws, where the Deft has prop, the Ct & pltf are liable tho the off is justified. 1 Wils 153. Esp. 332. Eg again committing by commissioners of bankrupt. Esp. 391. 2 Bl R 1035: 1141. 8 Co 114 1 Stra 710.

III. again any process of any Ct may be void independently of any ques of jurisdiction & here the pltf is liable for whatever is done under it. 3 Wils 341. 345. 2 Bl R 845. Salk 700. but the off is not liable if the process is from a Supr Ct. even tho it appears from the face of the process that it is void. But if from an inferior Ct the off is liable, if it appears on the face to be void. 3 Wils 345.

If the process is from an inferior Ct. the rule is if the Ct have jurisdiction but the process is void, & the off executing it after it has been set aside, the off is liable. & this holds tho the process is from a Supr Ct. of genl jurisdiction & if from an Inferior Ct rule the same. Ray 73. 2 B. R 845. 3 East 128. 1 Wils 345. 1 Stra 509. 15 East 612-5 (this is not a very equitable rule)

Subsegt oppression of the party arrested on regular process subjects the Ct & pltf — Esp Dig

An arrest under a process founded on an irregular proceeding is void. Eg a judgt has been set aside for irregularity, & the pltf afterwards takes out Exn & an arrest is made under that Exn the pltf wd be liable, but with regard to the off. if the process was from a supr Ct of genl jurisdiction he is excused, but if from an infr Ct he is not excused. Esp. D. 329. 391. 3 East 128. 1 Stra 509. Rayd 79.

If an off executes the process of a supr or infr Ct before it is set aside & it is afterwards set aside he is not liable. Esp 391.

After the process of a supr Ct is set aside the pltf is liable tho the off executed it before it was set aside ([illegible]) 15 East 615. 1 Lev 95.

But where a process is merely erroneous the execution of it is justified in the pltf & off even tho the process sd afterwards be set aside — for erroneous process is valid till reversed — & it is voidable only. 3 Wils 345. Esp D 391. 1 Stra 509. 710. 2 TR 731. 3 Bac 333. 2 McNal 488–9.

Recapitulation.

I. It is agreed that where the subject matter of the process is witht the jurisdiction of the Ct issuing it, of whatever kind the Ct may be — the Ct the pltf & the off are liable. Eg. Eccy Ct of C.P. arrest a man to answer to an indictmt & this rule holds tho the defect does not appear on the face of the process.

II. When the want of jurisdiction goes only to the person or place, the off is justified unless the defect appears on the face of the process — & this holds of all Courts.

False Imprisonment

III. Where the defect of jurisdiction is not as subject matter but as to place or person. & the process is from a sup. Ct even tho the defect appears on the face. the off is not liable. but if from an inferior Ct. the off is liable in this case –

IV. Where the jurisdiction is complete & the process is irregular & from an infr Ct. the off is not liable unless this irregularity is apparent.

V. Process, merely erroneous justifyes all acts done under it before it is reversed. even tho it is afterwards reversed.

These rules apply in genl to mesne process. It is said that where the arrest is on final process from an infr Ct. the off must justify by stating that the cause of action was in pleading alledged to have ~~been~~ arisen within the jurisdiction of the Ct.
Coup 20. Bul & B.

Irregularity is not defined in any of the Eng Books. An irregular process is that whh a Ct will set aside in a summary way on motion, it does not require a writ of error or an appeal — **Irregular Process.**

Process is held irregular & void when filled up witht proper authority. 2 Wils 47. Esp D 329. & here the person executing the process must be liable tho he did not know the defect.

Again process informally issued is irregular & void. Eg issued by a private individual. Stra 993. Esp D 329. 2 Wils 385. 365.
A writ made returnable to a term after the first term whh by L. it can be returned.

Again where a writ is made returnable at an uncertain time. where the words were, at the next Ct of the marshea it was held void. but afterwards in a similar case the words at the next Ct were held good. Cro E 914. Esp D 330. 1 Mod 81. Comb 21-2. 2 Mod 58. for the terms of a Ct are supposed to be known —

These two last rules do not at CL apply to final process. but they by stat do apply to it in Comn —

Tho an original arrest be lawful any subseqt oppression in confining the person arrested is false imprisont. for confining one in an illegal manner is illegal imprisont Esp D 332. 1 TR 536.

An arrest under genl search warrants are illegal & void Eg to arrest the author of a certain libel — a genl warrant to search for stolen goods. 2 Wils 275. 1 Hale PC. 150. Esp D 399. — **Arrest under search Warrants,**

False Imprisonment

Arrests under search Warrants There are four requisites to the validity of a search warrant. 1st It must be granted on oath. 2d the complainant's grounds of suspicion must be alleged. 3d the warrent must be executed in the day time & by a known offr in the presence of the informer 4th the warrant must be directed to some particular place as the house &c. & even when all the requisites are observed the informer is justified only by the event. 2 Wils 291-2. Esp D 399.

The off. where all these requisites are observed is witht doubt justified by the warrant.
When an off justifies as such the only proof of his official character is, that he acted as such off; witht showing his appointment. Stra 1045. 3 T R 632. 4 Do 366. 2 Mac Nall 425.

When an off serving process justifies under it he is bound merely to show the process itself & also that it is returned if the day of return has arrived & if return is required. Esp D. 333-4. 6 Co 52. 2 Stra 1184. But this holds only of mesne process, for mesne process witht return is no evidence. 5 Co 91(a). 4 Co 64(a). Cowp 21. 1 Wils 17.

But this rule does not hold as to a deputy shff by C.L. for at C.L. a deputy cant return a process — secus in Comn

Plt under an arrest on final process must show a judgt as well as exn secus quoad the shff. 1 Salk 408-9. Esp D 333-4.

The officers aſsistants justify precisely as the Shff & indeed the rule wd. L. G. thinks go farther. & that the individual wd always be justified by the command of the Shff. Salk 408. 9

But where an individual procures the service of proceſs for another he must justify precisely as the off. he must show judgt as well as exon he takes the place of the plff. Salk 408. 9.

If the original Plff & the off are sued together, & both join in one & the same plea, & the plea of insufft in L. for one it is for both—

Where the liabilities of the off & Plff are difft. they shd sever in their pleas. tho they may plead the same plea. & still not join in the plea. Esp ~~D~~ 336. Str 993. 1184. 509. 1 Wils 17. But if they both join in the same plea & the plea is bad as to one. it is so for both—

Procuring—commanding—aiding—aſsisting in an illegal impriſont. (in any of these ways one may become a treſpaſser) is false impriſonment. Co Lit 57(a) 1 Salk 409. 2 Hawk 572. 3 Wils 377.

If a servt for instance aſsists—the command of the master cant justify. (so if the servt keeps the key of the door when one is wrongfully confind) And procuring a sovereign prince thro fear unlawfully to impriſon another, is false impriſont. 2 Bl R 983. 1055.

If the shff does not return a proceſs wh is returnable he may treated as a treſpaſser ab initio.—because the writ can be no evidence in a Ct of justice—

5 Bac 162
Salk 409.
Ld Ray 632.

Malicious Prosecution.

This is an action on the case, it lies to recover damages vs any one who has prosecuted another maliciously & witht probable cause –

By probable cause is meant reasonable ground of suspicion. 1 Fitz 116. Esp. 525. 527-8. 1 Bac 61.
By malice is meant any unlawful motive.
This action is analogous to the action of conspiracy wh is now nearly out of use.
But the action of conspiracy lies only vs two or more for prosecuting one for the offence of treason or felony. 1 Saund 230 n. 3 Bl 126/316. 2 Ray 379. Esp. 540.

Actions analogous.

This action also resembles the action on the case in nature of a conspiracy, wh is where two or more conspire to injure another in his person fame or prop. or to prosecute another witht cause & maliciously. Salk 14. Saund 230 (a). Esp. 531.

The grievance of the action for malicious prosecution also resembles the action of slander: for the vexation, expense, & scandal are sufft grounds of damages to maintain this action. 3 Bl 127. 10 Mod 219. Stra 691. Salk 13-14.

The action of conspiracy lies not unless the plff has been actually prosecuted & actually acquitted, for such is the form of the writ.
An indictment for conspiracy lies witht any actual prosecution. Cro. Ch. 12 Co 23. Esp. 527-8. 1 Wils 211. Esp. 531 = Fitz 114. 9 Co 56 (b). 2 Lev 57. Esp. 531.

Malicious Prosecution

So an action on the case in nature of a conspiracy lies tho no indictmt has been actually made. 1 Rol 112. 1 Bac 61.

In an action of ~~a~~ conspiracy if all the Defts except one are acquitted judgt cannot go agt him. but in an action on the case in nature &c — one only may be subjected. The declaratn must indeed charge two Defts or charge one simul cum others conspired &c — 2 Ray 379. Bul 14. 1 Wils 210. Esp D 530. 6 Mod 169.

In the action of conspiracy the gist of the action is the personal danger. but not so in the action on the case in nature &c. Carth 416. 2 Bl 126. 127. Buller 14. Stra 691.

An action on the case in nature &c, is substantially the same as that of malicious prosecution, but the latter may be brot agt one witht the simul cum &c. 2 Lev 52. 1 Wils 210. 1 Saund 230(a). Esp D 531. Bul 14. 5 Mod 408.

Malicious prosecution may be brot vs two. (Q?)

The action of conspiracy & on the case in nature &c. & for malicious prosecution ~~originated in~~ was not known at the C.L. the action of conspiracy originated in Edw 1st & was formed by his direction. & sanctioned by his parliament 2 Reeve H. C.L. 239. 328. 3 Do 58. 127. — (Bul 14. Carth 416.) But the two last actions are derived from West 2d 2 Le. 20.

In the action for malicious prosecution, malice & want of probable cause must concur. Bul 14. 4 Burr 1971. 1 TR 544.—5. Esp D 529.— Cro El 900. Esp D 633. Bul n P. 14. Probable cause is a suff justification.

In practice the real gravamen of this action is the same as that of slander viz the injury to the reputation. but in slander nothing but the absolute truth of the words will justify. but here probable reason that the charge was true is suff^{t}.

This action lies for a crim^{l} prosecution & sometimes for a prior civil suit.

In what cases this action lies.

1. It will lie where one has been falsely & maliciously indicted for a crime wch wd injure his reputation or 2^{d} for an offence wch wd endanger his life or liberty, & now for an offence wch wd subject the person indicted to mere expence with^{t} endangering life or liberty or reputation. & it wd therefore now seem that this action lies in all cases in wch one has been falsely & maliciously indicted Salk 14. Yelv 46. Sid 15. 1 Ld Ray 378. 1 Str 977. Esp D 528. Salk 15. Stile 379.

And it is not necessary that the pltf shd have been endangered at all, for if the indictmt is radically defective this action lies. 4 T R 248. 3 Bl 127. Esp D 528. Salk 15. 1 Bac $\frac{116}{61}$.
Scandal, vexation & expence are then suff^{t} to maintain this action so far as regards damage.

And this action lies for a mere presentment to a grand jury. tho the grand jury find the complaint untrue. Cro El 490. Salk 18. Esp D 528.
And mere expence incurred by an insuff^{t} indictmt will support this action tho there is no danger of life, liberty or reputation. 3 Bl 127. Salk 15. 10 Mod 148. 214. 2 Str 977. Esp D 528. 6 Mod 25. 73. 137. (Salk 14. 15. contra)

Malicious Prosecution

But a public officer commencing officially on false information a prosecution, is not liable. but the individual giving the information maliciously & witht probable cause is liable. 1 Leon 187. Cro El 130. 2 TR 231.

But if a public off witht any information & of his own mere motion, maliciously & witht probable cause prosecutes another he is liable to this action. 2 TR 231. 225. Cro El 130. Comp 161. 1 Bac 61. And if the magistrate is the off in this case & he grants the warrant trespass for false imprisont is the proper action. for here the magistrate is the immediate & not the remote cause of the arrest. for the shff is merely the instrument. but where the off is the remote cause of the arrest. false imprisonment will never lie. 2 TR 231. Esp N P 530. (contra Cro El 230.)

This action never lies till the malicious prosecution is in some way at an end, for if it could a strange incong~~[illegible]~~uity wd occur. 9 Co 56. Hol 267. Doug 215. Stra 114. 2 TR 231.
In this action this fact must be alleged. the pltf must allege that the prosn is legitimo modo acquietatus 9 Co 56. 1 Doug 215. 11 Mod 269. 2 TR 231. Hol 267. Stra 114. + action of conspiracy — (legitimo modo acquietatis is not necessary in malicious prosecn.)

The omission of this allegation is aided by verdict, for the ct must intend that the jury had evidence of the termination of the prosecution, 1 Saund 228. Esp N P 532. Hol 267. Doug 215 2 TR 225. Swifts Di 778.
And the pltf must show in his declaran the manner in which an end was put to the prosecution & that too correctly. B N P 14. Salk 21. 6 Mod 261. Esp N P 536.

The declaran must also state all the proceedings in the original prosn & any misrecital in any material point is fatal as a variance. Eg declaran states an acquittal on the 1 Septr & it is found on the 2d Sept. it is fatal. 4 T R 540. Esp D 532-3. 2 BHR 130. 6 Mod 216.

But this action will not lie vs a judge of record or vs a petty or grand jury for any acts done in the regular discharge of their official proceedings – Eg jury find verdict vs evidence. 1 T R 513. 513-14. 534. 535-7-8. Cowp 161. 172. 1 Hawk 191. 1 Bl R 141. 12 Co 33.

Malice may be & generally is inferred from the want of probable cause, but want of probable cause can't be inferred from any degree of malice. 1 T R 544. 4 Burr 1974. Esp D 529.

The plff is however always at liberty to prove express malice & for this purpose he may give in evidence any collateral facts tending to prove malice. Str 691. Esp D 535.

But conviction of the present plff in the original prosn before a Ct of competent jurisdiction is conclusive evidence of probable cause. 1 Wils 232. Hob 267. Esp D 529. 6 Mod 262.

The acquittal of the party prosecuted is presumptive but by no means conclusive evidence of want of probable cause. It merely throws the onus probandi on the Deft to show probable cause. 1 Wils 232. Esp D 520.

And acquittal, even for a defect in the indictmt or process is in genl presumptive evidence of the want of probable cause. 4 T R 247. Salk 15.

Acquital not presumptive evidence of the want of probable cause.

But an acquital in three cases is not even presumptive evidence of want of probable cause.

II. If the pltf in the present action was bound over by a Ct of enquiry.

III. If in the prior prosecution the grand jury found a true bill vs the present pltf, this shifts the onus probandi.— But there is one exception to this exception viz when the facts on whh the original indictmt was made must necessarily lie in the knowledge of the present Deft. & this exception holds in the first exception. Bul 14. Esp Di 536)

IIII. If it appears from the judges report of the cause that there was probable cause, this is prima facie evidence Salk 15: Bul 14. Esp D 536.

The evidence whh the complainant gave before the grand jury is in this action good evidence of himself of probable cause in his own favor— So his evidence on the trial of the indictmt— The Deft himself cant give evidence but other witnesses may prove what he said. This rule is founded on the necessity of protecting prosecutors.
But this rule does not obtain if there were other witnesses of the fact charged in the former prosecution. Bul 14. Esp 535-6. 6 Mod 216.

What amts to probable cause is a ques of L. but the existence of probable cause in a given case is in the first instance a mixed ques. but when the facts & circumstances are ascertained, the ques then becomes a ques of L. 1 T R 545. 519. Bul 14. Esp 535.

Defence.

The defence to this action is always probable cause & turns upon this fact, & probable cause must always be specially pleaded & he must set forth the precise facts on wh his suspicions were founded — The pltff may traverse & deny these facts or he may demur. Crabb 134. Chf D 533.

It appears to be essential to the defence of probable cause that the offence prosecuted for shd have been committed — Hopkins & Clinton — comm. / 6 Mod 216. 2 Hawk 120. Ch. P. D. 534. 2 Root 225.

What amts to malice is a ques of L. what facts exist to create it is a ques for the jury. 2 L Ray 1493. 1 TR 519. 1 Wils 233.

Where the former prosecution was for felony the pltf must produce a copy of the record of the indictmt from the Ct. but where the prosn was merely for a misdemeanor a copy tho not granted by the Ct is suffst. In the former case it is in the discretion of the Ct. to grant or not to grant a copy — i.e. the Ct trying the indictmt) Carth 421. 3 Bl 126. Ch D 534. 1 Bac 61. 1 Bl R

Under our L when the prosn complained of was a crimn prosn the action is called malicious prosn & where it was a civil suit it is called an action for a vexatious law suit.

Proceeding under civil Suits.

An action will not lie for a vexatious civil suit however groundless the claim may be if this is all in the case. Salk 13–14. Bull 11. 1 B&P 205. 10 John 106. Ch D 525. 1 Pl Ev 116. (n).

But no rule means merely that in such case he presumes no damage, & this rule admits of four exceptions.

Where the action will lie. for a civil Prosecun

I. When there is a good ground of action in favor of one person & a stranger & witht authority brings a suit on this ground of action, the action lies. Salk 14. Bul 12. Esp D 526.

II. When the plff having a good cause of action sues in a Ct not having cognizance of it. this action lies. but S.G. thinks that the plff must have known that the Ct had no jurisdiction, for witht this knowledge malice cant be presumed. 2 Wils 302. Esp D 526.

III. If one having no cause or colour of action & knowing this, sues another for mere vexation & holds the Deft to bail this action lies. 2 Wils 305. 1 Burr 388. 2 DJ 129. 3 East 314.
But it seems that the action will not lie unless the Deft was obliged to find bail. 2 Ph Ev 116. (n). Peters R 207 (or imprisoned) for unless he was held to bail, the costs are held to be a suff compensation. From the old books it wd seem, that such an action wd not in any case lie — S.G. thinks that the action might lie if the Deft in the first suit was not held to bail;

IV. If one for the purpose of vexation sues one & holds him to bail for a much greater sum than is actually due, this action lies — here holding to excessive bail is the gist of the action; Bul 12. Esp D 525–6. 1 Saund 228. 1 Wils 424.

Again this action will lie for making a wrongful & oppressive use of final process. It will lie for the wrongful taking of goods as well as the body. Hob 266. 205. Bul 12. Esp D 527. Here no costs to be recovd. to be a satisfaction for the injury.

Where the action is for a prior civil suit the particular injury must in genl be stated in the declaran — but the proceeding was vexatious, on purpose to put him to excessive bail — here the Law does not presume damage. 2 Wils 305. 1 Salk 14. Sidr 424. 2 Ray 381. Bul 12. Esp D. 532.
And the pltf must prove the special damage. Eg prove that he was held to excessive bail — 2 Ray 377. Salk 14, 15.

If A incites B to bring a groundless suit vs C, A is liable to C in this action & here special damage need not be alleged 2 Ray 380. Salk 14.
To maintain this action for a prior civil suit there are two essential requisites.
1. The prior action must in some be determined.
2. There must be damage already incurred or inevitable
If one forges a bond in my name, with intent merely to sue, I cannt sue him for forging the bond until he sues me, & that suit is determined. And again if one takes out a second fi fa wrongfully, I cannt sue until the second fi fa is put in exn. Doug 215. Str 114. Salk 15. Bul 13. Esp 527. 531.

But it is not necessary that the prior suit shd have been determined in favor of the present pltf. it is sufft that an end is put to the suit & not in favor of the present Deft. Bul 13. Esp D 527.
Our stat gives this action to any one who shall be vexatiously sued — & gives treble damages & subjects to a fine of seven dollars on verdict vs him in this suit. this fine is imposed on motion of the pltf — Single damages are only recovered in Eng.

Malicious Prosecution.

Two persons can^t join in this action, for the injury is seperate & personal even tho the present pltffs were sued as co defts — Kid 178.

But in case of two jt merchants, who have been sued together to the injury of their jt trade. perhaps here is an exception, in analogy to Slander.

Two persons may be joined as defts, for this is a tort in wh any number may join. 1 Stra 99. 2 Do 910. Bf D 537.

May damages in such cases be severed?
there are two cases directly contrary. Stra 99. 2 D 910. Bf 537.
Z.S. thinks damages can^t be severed it is an indivisible wrong & all the diff acts done by each conduce to the same result ==

The mode in wh the former suit was bro't to an end must be correctly stated. & a variance is fatal — Bul 14. Bf D 536. Salk 21. 6 Mod 261.
Declarat^n must state all the proceedings in the suit complain of — & any variance in a material part is fatal —
4 TR 590. Bf D 6 Mod 216. 2 Bl R 1050. Bf D. 532.

Treſpaſs for injuries to things personal.

Treſpaſs is divided into three kinds.
I. Treſpaſs to the person as asst. & battery, & false impt.
II. Treſpaſs to real prop as treſpaſs quare clausum fregit.
III. Treſpaſs to personal prop. whh is now to be considered.

The term treſpaſs in its most extensive significatn includes every transgreſsion of the L. 3 Bl 208. Bac 157.

But in its true legal sense it denotes any civil wrong committed with force to the injury of anothers person or prop & this is its more common acceptation. Esp 380.

The rights of personal prop in poſs. are liable to two species of injury—
I. The damage to the chattle while it continues in poſs. of the owner.
II. The deprivation of that poſs.

Personal prop may be injured in a great variety of ways witht obtaining the poſs. as killing anothers animals—poisoning them & inflicting a personal hurt or in genl in any way wht take from the value of the chattle 3 Bl 153.

The remedy afforded by L for any such abuse while the owners poſs continues, is the action of treſpaſs vi et armis, provided the act be committed with force, & immediately injurious. 3 Bl 153. Rol 556. Esp 598.
The action then lies only for such immediate injuries as are committed with force & when the injury complained of is the immediate consequence of the forcible act,—for a remote & consequential damage accompanied by any tortious act. treſpaſs on the case is the only proper remedy—

Trespass for injuries to things Personal.

If trespass is brot where case is the proper remedy, or vice versa the fault is incurable even after verdict 6 T.R. 125. 2 Mod 131. Cro C 141. 156.
The judgt in these two forms were formerly difft, the one a capiatur pro fine, the other a misericordia. This is the foundation of the last rule.

This action is not brot to recover a specific restoration of the goods taken, but to recover damages.

There is one case in whh trespass will not lie for an unlawful takeing nor any action at C.L. ie the unlawful takeing of a ship or goods as a prize.
The remedy in such cases is always in the admiralty Ct. Doug 572. 598.

There are some cases in whh trespass will lie where the original taking was lawful, for a subseqt abuse of the prop. The rule is where an authority is given by L to take poss of anothers goods a subseqt forcible abuse of them makes the party takeing a trespasser ab initio - so that he may be subjected, on a declaran charging, that he unlawfully with force & arms took & carried away the goods. Bull 81. Cro J 147. 8 Co 146. (b). 3 Wils 20. 1 T.R. 12. Esp 383. 405. 2 Bur 1281. 1 Rol 20.

Eg. Traveler enters an inn & afterwards commits a trespass &c so shff having taken goods on Exn destroys or uses them. Salk 221. 8 Co 146.

But to make one a trespasser by relation the subseqt abuse must be a positive tort, or misfeasance & not a non feasance. 2 Rol 556. 1 Mod R 130. Esp

There is one case whh has been supposed to be an exception to the last rule. It is where a Shff having taken goods on lawful process does not return the writ when the L requires it. & is thereby subjected as a trespasser. 2 Rol 563. L Ray 632. Salk 409.
But the true ground of the rule is that the writ not being returned, can't be offered in evidence, & the Shff therefore can have no justification.

Where the owner of the goods gives the licence under whh another obtains poss. the latter can't in genl be made a trespasser by relation, the L annexes a condition to its own licence but not so to the licence of the owner. 8 Co 146. (b). Yelv 96.

A bailee therefore can't in genl be made a trespasser by relation. (Ib). 5 Bac 162.

To this rule there is one exception. Eg. if bailee destroys the goods, trespass lies or trover, or special action on the contract for this wanton act destroys the contract of bailmt. Lit 571. Co Lit 57(a). 5 Co 13(b). 5 Bac 266.
To maintain this action the pltf must have had poss of the prop at the time of the injury done. 4 TR 489. 7 TR. 9. 1 Do 480. [illegible] 343. Eg goods are leased for a year & an injury is committed the reversioner can maintain neither trover or trespass. 7 TR. 9.

Trespass for injuries to things personal.

But a constructive poss. is suff^t. vs a stranger tho' not suff^t. vs the party rightfully in poss. So goods in the hands of a depositary, the owner may have trespass vs a stranger, but not vs the depositary (ab). 2 Rol 569. 5 Bac 164.

And any person having the gen^l. poss. may maintain trespass vs a stranger, this admits of the exception of the reversioner ante. For the gen^l. prop. draws after it the right of poss. as vs strangers. Latch 214. 2 Bulstr 268. 1 Sid 438. 2 Rol. 569.

But the gen^l. prop. must be accompanied with a present poss. If the owner is not in actual poss. he must have a right not of future but of present poss. In this case it is held that a special action on the case lies in favor of the reversioner vs the wrong doer. 1 T R 164. 3 Lev 209. 359. 2 Ld Ra 133-4. 4 Esp 432. 11 Co 385.

Distinction between trespass & trover—

The former is founded on poss. the latter on prop.— but trespass & trover are in gen^l. concurrent except in the case of bailee vs whom trover lies but not trespass— 7 T R 9. Bul 35. Esp 576.

He who has a special prop. in goods & poss. may have this action against a wrong doer— a bailee &c. Co Lit 89. 4 Co 84. 2 Saund 47. 4 Bac 164.

Every bailee may in all cases maintain this action vs a stranger & the bailor has this action (whenever he has a present right of countermand vs the bailee) vs a stranger.

If the bailee of goods delivers the goods to a stranger the bailor can't maintain trespass nor trover witht demand & refusal or actual conversion 5 Bac 164. 175.
The bailor may in any case demand the goods even tho' let for ten yrs. for whatever was the nature of the bailmt. this attempt to assign is a breach of trust & wh destroys the bailmt so that the bailor may immediately demand poss.

If goods are sold to A by a complete contract so as to vest them in A & B. take the goods before they are delivered A. may have trespass vs B. for he has a constructive poss. Latch 214. 5 Bac 164.
If the effects of a testator are wrongfully taken away before the will proved, the Exr on proof of the will or the Adr on letters of administn granted may maintain trespass vs the taker. 2 Buls. 268. 1 T R 480. 5 Bac 164.
The adr has the constructive poss by the doctrine of relation. the Exr has an interest at the time —

The legatee may have this action for wrongfully taking a specific legacy, after the consent of the Exr tho' the legatee has not taken actual poss.
But the legatee of a certain part as of one third of the goods can't have this action until after distribution. 1 T R 480. 5 Bac 164.

If trespass is brot for goods belonging to two or more all the owners must join in this action, but the non joinder can be pleaded in abatement only. Salk 32. 1 Lev 354. 1 Str 820. 3 L D 411. 586. Salk 4. (Old books contra).

Trespass for injuries to things personal.

At Com. Law trespass will not lie for an act amounting to felony for by the commission of the felony all the offenders property vests in the Crown. 1 Lev. 21. 44. Latch 144. Yelv. 90. Say 82. Stra 449. 2d Ray 1572. Bul 181.

In Connt. this rule is not acknowledged — separate actions

In declaring the cts require that the goods be described with convenient certainty, for unless so one recovery will never be a bar, & the deft must have notice for what goods he is sued. 5 Co 35. 2 Ld Ray 1410. Esp 415.-6. 4 Burr 2455. Stra 634. But this rule applies only to cases where the injury to goods is the gist of the action. & where it is founded on the taking. where the taking or injury is laid only for aggravation the description may be genl. Eg trespass for breaking pltfs house & injuring his goods. 3 Wils 292. Esp 416.

But a genl. description may be suff. where it is made particular by something else referred to in the declaratn. Salk 643. Plowd 114.

In a declaratn relating to goods, a trespass can never can be laid with a continuando. Each trespass shd be distinctly alleged. Salk 638-9. 2 Ld Ray 239. Esp 416. 417. 8.

The pltf must state a prop or a poss which shews a right of poss. at the time of the injury done. Salk 640. 2 Lev 156. Cro C 46. Esp 4 Wils 383. (It seems suff. to state genly that the goods were the prop of the Pltf

The value of the goods must also be stated, but the omission of this allegation is aided by verdict. 1 Sidn 39. Cro. C 129. 4 Bur 2455. Esp. D 409-*. 2 Lev. 230.

If the plff has recovered judgt vs the present Deft or vs another for the same wrong, this is a good bar. Hob. 128. Stra 406. Cro. E. 43. Stra 1078. Esp. D 593. Yelv.

The trespass must be laid on a day certain but the plff is not confined (Bull. 17. [illegible]) in proof to that day. Cro. El. 32. Hob. 104. Esp. D 319. 321. 409. 415.

If the Deft prove a license on a particular day he must traverse that he is guilty on any other day (vide Pleading.) Hob. 104. Esp. D 415.

Where the trespass is committed by several, each, all & any may be sued, but he can have only one judgt except for costs. Stra. 420. 5 Bac. 192.

It is said that if one is sued alone & it appears in the Declaran that another person unknown to the plff was a jt trespasser, that the declaran is ill for not joining the other. But this cant be L. torts are several and one may be sued alone. Hob. 199. 5 Bac. 192-3. Leon. 41.
Besides in every days practice it comes out in evidence that a co trespasser was not joined, & yet this never occasions a non suit. & besides one co Deft is frequently struck out.

Trespass. for injuries to things personal.

Justifications must be specially pleaded because it is inconsistent with not guilty. further if a justification pleaded by any one of the defts shows that the plt. has no cause of action vs either of them, & this justification is found for this Deft. the plt. can have no judgt vs either of them even tho the co Deft was found guilty— or let judgt go by default. Stra 610. Hob. 54 Ray 1372. Esp 421.

The trespass must be alledged to have been committed with force & arms & vs the peace. an act of judgt in such case – a capiatur pro fine. 4 Co 44 a. 4 Bac 11. Esp D 418. 5 Bac 191.

These words are still necessary, tho judgt is now taken away to let in the provisions of the stat which takes away the judgt Salk 640. Esp D 408. Bac 93.
But these words may now be inserted at any time if omitted.

In Connt these words are but matter of form —

Pleadings.

Pleadings are defined to be the mutual altercations between the Plff & Deft put into legal form & set down in writing — This definition is for pleadings in civil cases — 3 Bl 293. 10 Co 132. 4 Bac 1.

In criminal cases the party accused does not usually plead in writing.

All pleadings were anciently oral, hence pleadings are frequently called the parol. 3 Bl 293. from the time of the conqueror to the 36. Edwd 3d the pleadings were in the Norman French. from this time to the time of the commonwealth, the pleadings were in Latin. during the commonwealth they were in Eng. from the restoration to 4 Geo 2 they were in Latin — since they have been in Eng — 3 Bl. 317. 324. Lawes 23. 29.

From the definition it will be perceived that pleadings are merely setting forth on the records such facts as constitutes the Plffs cause of action — or the defts defence — The rules of pleading Ld Mansfield says are founded on the closest logic & the soundest sense. 3 TR 159. Doug 278. 4 Bac 1. 1 Bur 319. Lawes 2-3.

Every good decln & every good special plea is a good syllogysms. it contains at least the elements of a good syllogysms.

Eg — Trespass quare clausum fregit. is him who has made a forcible entry on my land. I have a right to recover damages — the Deft has forcibly entered on my land, therefore I have a right to recover damages of the Deft — The major proposition is indeed not usually expressed for the Judges know ex officio what the law applicable to a given state of facts is, but it is not always omitted as in the decln vs com car & Innkeepers — the major is usually expressed, but it is not now necessary to state it. Ld Ray 88. 175. Cl B. 184.5. 234. 2 Cl R. 294.

The minor proposition contains the facts to which the principle in the major is to be applied in the case. The conclusion is then an inference of law from these two propositions. 3 Bl 396.

The major asserts a proposition in law. the denial of this propn is an issue in law by demurrer or arrest of judgt. The minor propn is to be denied if at all by an issue in fact which must be by the genl issue or by a special issue.

The conclusion can be denied only by some new matter, the concl^{n} cannot be denied by issue, for if the major & minor be true the concl^{n} is irresistible with some new matter, Eg.- The Deft pleads a release &c, the Deft at com. L can deny the concl^{n} only by special plea, this release then must be pleaded specially, & this special plea presents a new syllogysm wh. may be stated thus. He upon whose land I have entered releases the trespass &c - The pltf has released, therefore &c - In pleading as said before the major is not expressed. the pltf then must deny the first or second prop^{n} or the conclusion. if he denies the major he demurs. if the second he pleads non est fact.- if the concl^{n} he must allege new matter as that the release was obtained by fraud & this again presents a new syllogysm -

The sole object of all pleading is to simplify the controversy by narrowing it to some single point-

The first stage of a suit is the writ. wh. is a mandatory letter directed to the shff issued to compel the appearance of the Deft- the commencement of the suit is the issuing the writ. & tho in Com the writ usually bears a fictitious ~~name~~ date- but the date may be denied. 3 Bl. 273. 285: Comy 454. 7 T.R. 4. Wils 149. 2 Bur 960. Carth 283.

In the practice of B.R. the original writ is dispensed with in most cases & the pltf files a bill counting upon a fictitious writ out of Chancery. in B.R. then the fileing of the bill is the commencement of the suit. 1 Bac 41. Co 48. 9 Bur 1323. Comy 452

In Com we have none of this fiction- here there must always be a writ. & the writ & decl^{n} issue together.

The first stage of the pleadings is the Count or decl^{n}. this count or decl^{n} is called an amplification of the writ containing the particulars wh. show the right of action. 3 Bl 293. Carth 334. Salk 219. 4 Bac 8. Lawes 1. 2.

By the pleadings however is sometimes meant only the allegations which follow the decln. 4 Bac 1.6. Lawes 1.2.

The first stage of the proceedings whh follow the declaration or count is the defts plea. & the pleas on the part of the defts are of two kinds 1st dilatory pleas. 2d pleas to the action, or pleas in bar, whh two mean the same thing? 3 Bl 295. 301. 4 Bac 1.6.

Dilatory pleas are such as tend to delay the pltfs remedy. by questioning the mode in which the pltf seeks his remedy & not the pltfs right of action. It is said that a plea to the pltfs remedy. is to delay the pltfs suit. but it defeats the pltfs suit. & delays only his remedy by forcing him to bring a new action. or to amend his writ or decln. 3 Bl 301.

Dilatory pleas are of three kinds. first pleas to the jurisdiction. 2ly. to the disability of the pltf. 3ly. a plea in abatement. the third kind has several subdivisions. 3 Bl 301. Bac tit. plead: Lawes 37.

All dilatory pleas are frequently called pleas in abatement, this is not strictly correct. 3 Bl 302.

Pleas in bar are answers to the merits of the pltfs demand, they deny that the pltf has any right of action, & the cause of action may be denied by pleading in three different ways. 1st by denying the pltfs allegations or 2ly. by confessing & avoiding those alledged actions, or 3ly by estopple. this third mode neither confesses or denies the pltfs allegations it merely shows that the pltf has no right to make his allegations & its effect is the same as denying the allegations of the pltf. 3 Bl 303.-5-6. Lawes 37.-8. 115. 130. 140.

These pleas to the action are two fold. the genl issue. & a special plea in bar. both these are pleas in bar. the one genl the other special. 4 Bac 54. 3 Bl 305.

The cause of action may also be denied by a demurrer. tho this is not strictly a denial of his right of action by pleading the demurrer denies the major propn. & it is not called a plea. because it alledges no matter of fact & denies none. its office is to deny the legal sufficiency of the facts stated in the decln. A demurrer is called an excuse for not pleading. & the form of the demurrer shows the propriety of thus calling it. 4 Bac 129.130. Co Lit 72(a). 5 Mod 132.

In all pleadings there are two requisites. 1st that the facts alledged be sufficient in law. 2d that the facts be stated in forms of law. an omission of these or either of them is a fault & good cause of demurrer. the first is a defect in substance. the latter a defect in form only. Hob 164. Cowp 683.
As a genl rule it is only necessary for a pleader to state facts, & as the case may be or conclusions from them. i.e. facts as they actually exist or as they exist by fiction & presumption of law. & this concln from facts is to be stated as facts—

It follows then that the pleader need not state matter of law: but only matter of fact. 5 T R 70. Doug 159. Lawes 46.

It is never sufficient for a pleader to state the mere evidence of a fact. the fact itself must be substantially alledged— Eg— in indeb. asst. the indebtedness is only evidence of asst & therefore the indebtedness is not all whh the pleader must state— he must state as a fact a promise— & the indebtedness is sufficient evidence of a promise. 1 Lev 164. Cro El 913. Stra 793. Lawes 49. 1 L Ray 1519. 2 Root 44.

There is one instance in which in asst no express need be alledged viz. in asst on a bill of exchange or promissory note vs the drawer or promissor— Salk 128. Stra 224. Kyd B. 196. 2 L Ray 538. 4 Mass 451.

But even here the practice is to state a substantive promise & G. thinks it to be hazardous to omit it.

Again, pleading by way of argument & recital is improper but this rule applies merely to material traversable facts, these must be directly alledged— Eg— in trespass if the pltff should declare whereas the Deft hath entered upon pltffs land &c. this would be bad for the traverse would only amount to this. that whereas I did not enter &c— 4 Bac 22. Co Lit 303. 1 Saund 274. Lawes 49. 139. 7 T R 458.
But these words "for this that &c" are suffly direct. also the word "altho' &c". is suffly direct. so "because" is held sufft 2 B & P. 49. 1 East 163. or 203. 2 Ch Pl. 199. 1 Saund 119. Yelv 121.

So again the words "scilicet—videlicet &c" are held to be suffly direct. & the genl issue denies the goods or sum laid under the videlicet. Ib—

In genl too the time & place of material allegations must be alledged tho the time day & place need not in genl be stated Com Di Pl. C. 69. Cro Ja 183. Cro E 88.

(For time & place are supposed to add to the certainty of the pleading) & with regard to place the reason is that formerly every material fact was to be tried by a jury.

Each party admits so much of his adversaries material allegns as he does not deny. Sal 91. 1 Wils 338. 4 Bac 2. 78.

Each partys pleading is to be taken in construction most strongly vs himself. Hob 234. Co Lit 303. Lutw 186. 2 H Bl 530. 4 Bac 2.

Number, quantity & price need not be stated truly except when a mistake in any of these particulars would occasion a variance from a record, bond, or written agreemt, or express contract. Lawes 49.

Surplusage does not vitiate any pleading. but repugnancy will vitiate any pleading if the repugnancy is on a point material it is a defect in substance - secus if on a point immaterial. Co Lit 303. 4 Co 42. 4 Bac 2. 94. 2 East 333. Cowp 288-9. Lawes 64-5. 170.

It is said that every thing must be pleaded according to its legal effect Ex - one jt tent enfeoffs his companion, the latter must plead it as a release, so if tent for life makes a grant to the reversioner of his estate, this grant must be pleaded as a surrender - again, Con never to sue a debtor, must be pleaded as an acquittance - again if a bill of exchange is drawn to a fictitious payee & comes into the hands of an indorsee by indorsement from the fictitious payee - the indorsee may declare on as a bill payable to bearer - Co Lit 193(b) 200(b). Com Di Pl. C. 3. Cowp 599. 1 Saund 96-7. Ld Ray 400. 1 H Bl 313. 569. 3 T R 182. 481. Ld B. 185-7. 234.

But tho the rule is laid down that these things must be pleaded according to legal effect yet. C. J. thinks that they may be pleaded as they in fact are & then the Ct will give them the legal effect (but the former mode is most Lawyer like) 2 H Bl 11.

What whh already appears on the record need not be formerly alleged- Ex. in trover for converting 100 pieces of coin describe as dollars, the value need not be alleged. Co Lit 303. 7 Co 40. 9 Co 59. 11 Co 25 a) 2 Lut R 17.

Again- necessary circumstances implied in facts whh are stated need be themselves expressly ~~stated~~ alleged. Ex - feofment implies livery of seisin - so a reversion implies

Salk 91. Co Lit 303(b) 2 Saund 305.a, no 13. 1 Saund 274. Cl 2 Str R 214.

A plea which blends matter of fact & matter of law so that they cannot be sepperated. ie so that the matter of fact cannot be distinctly traversed is bad. Ex - A brings false imprisonment vs B. & B pleads that he was sheriff of such a county & in that character had a right to imprison &c. this wd be bad. he should have pleaded the facts which gave him the right, as that he had process &c - 9 Co 25 a) 2 Mod 55: Lawes 138. 4 Bac 68.(a).

What is admitted by both parties in the pleadings cannot be contradicted by themselves or by the jury. & a verdict contradicting such admitted facts would be bad; 4 Bac 2. 2 Mod 5: Bul 285: Lawes 48 -

A genl estate in fee simple may be pleaded on a genl form ie - it may be alleged that the party was seised in fee without stating the time & manner of acquiring it. But all estates less than fee simple must be specially pleaded. ie. the commencement of the estate & the mode of acquiring it must be distinctly alleged. but this rule does not genl hold in declan

Co Lit 303(b) Cro C. 938. 3 Wils 72. 1 Ray 331. 333: 4 Salk 562.

For an estate in fee simple may be acquired by matter of mere wrong. whh is a mere matter of fact - but particular estates cannot be acquired except by some act or compact whh involves matter of law. whh must be presented to the Ct to judge of its sufficiency -

The reason why the rule does not in genl. apply to declarations, for the estate of the pltff in declan. is generally stated merely by way of inducement, but in the subsequent pleadings an estate is never alledged by way of inducement

Immaterial averments as contradistinguished from impertinent must often be proved. immaterial averments here mean particular averments where a genl. averment wd be sufficient. It was formerly laid down that such averment must always be proved, but now they need not be proved except where the not proving it wd create a variance from record deeds & other contracts. Ld Mansfield says if the whole averment could be struck out without injury the averment is impertinent.

Eg. action v. shff by landlord for taking all the goods of the tenant without leaving suffct for a years rent, & the declan. stated that there was a lease on wch rent was reserved quarterly. when the rent was actually reserved yearly or semi annually. the Ct held that the pltff must fail. for tho this averment might have been made gen(ly) - yet having been made particularly & varying from a written contract it must have been proved. 2 Bl R 1104. Doug 640. 669. 2 Saun 206. a n 22) 207. a n 24. 2 East 499. 3 BR 643. Buly. 5. Esp Di 521.

If the pleading wants form or omits time or place it is in genl. aided by the adverse partys pleading over instead of specially demurring so duplicity is aided by pleading over, so the omission of profert in deeds. 7 Co 25 a) 8 Co 120. Co Lit 303. Carth 66. Salk 519. 4 Bac 2.

But where the pleadings are ill in substance nothing can aid them.

A party need not alledge more than will amount, prima facie to a suffct. cause of action, or to a sufficient defence. i.e. he need not anticipate the answer & the defences of the other side.

But this rule does not hold of pleas in abatement because they are not favoured in law — the same of estoppels.

2 Wils 300. Ld Ray 400. 1 Saund 299. 2 Bur 1037.

– If the pleading on one side expressly alledges a material fact omitted by the other, this pleading aids the omission. Eg. A brot trespass vs B. for taking & carrying away his iron hook without alledgeing that it was taken from the pltfs possession; the deft pleaded that altho he took the hook from the person of pltf yet &c – here the omission in the declaration was held to be cured by the plea in bar. 1 Sid 184. Com Di: pl E. 85. Esp Di 588. 5 Bac 197.

New matter alledged in any stage of the pleadings after the decln must conclude with a verification, for this conclusion is the only mode of keeping the pleadings open to an answer. 3 Bl 309. 1 Saund 103(a) Doug 68. Comb 395: 2 Bur 742.

Any matter pleaded in avoidance & not in denial is new matter. In every part of the pleadings the opposite party may deny – confess & avoid or demur until a proper issue is tendered, – hence arises the reason of the above rule, for the opposite having a right to these three modes, cannot have it unless the previous plea concludes with a verification. 3 Bl 309–11. 1 Saund 103. Lawes 148-9. 157. 158.

If then a deft pleads a special plea in bar, the pl[illegible] must conclude with a verification, if the replication contains new matter the rule is the same. 4 Bac 6.

Each party in each successive stage of his plea must pursue his preceeding allegations in the prior stages, otherwise it will be a departure. Eg – in a replication to a plea in bar, the pltff must alledge facts which will go to support his declaration & also answer the plea in bar. If this were not so, the parties might change their ground forever. Co Lit 304. 3 Bl 310. 2 Ray 146. Stra 422. Bul 14. 4 Bac 6.

When pleadings are submitted to the judgt of the Ct. that judgt is to be rendered on the whole record. Eg – decln is ill in substance & the plea in bar is ill & the pltf demurs, the deft will have judgt – for judgt will be vs that party in whose pleadings there is the first substantial defect. Hob 199. 2 Rl. 1 Saund 285; 8 Co 21. 133.(b). 9 Co 110. 4 Bac 7.

Declaration.

The term decla^{n} & count mean in some instances the same thing & in others not. when the pltf declares on only one cause of action & makes but one statement of the cause of action. decla^{n} & count are synonymous. but where he declares on two causes of action or makes more than one statement of the same cause of action each of these statements is called a count, & the whole together a decla^{n}. The declaration is called the foundation of the suit. hence it must contain all that is essential to the pltfs right of action.
If then the decla^{n} tho otherwise sufficient discloses any fact wh shows that at the commencement of the suit he had no cause of action his decla^{n} will be adjudged insuff^{t} & a verdict in such case does not cure the defect. — Eg — In debt on bond it appears on the face of the record that the suit was commenced before the right of action accrued — Co Lit 19.a) Hob 199. 4 Bac 6.13. Lanes 68. 2 Saund 394. Cro El 325: Co^{c}a 574. 3 Bl 193. Cowp 454. 7 B Rep 4. Doug 61.

So the omission of any thing in the decla^{n} wh is of the gist of the action is an incurable defect. the gist of the action is defined to be that without wh the pltf has no cause of action. & as S.J. says the gist of the action is that wh constitutes a cause of action — vide. amendt. sing^{r} 4 Bac 8. 5 Mod 305: 3 Bl 395: Doug 658. 4 T Rep 472.
Eg — If in trover the pltf should omit to state a conversion this is a incurable defect. So if in ass^{t} on a parol promise the pltf states no consideration. or if where a condition precedent is to be performed, the performance is not alledged. there would be incurable defects — So holder vs indorser & no notice alledged — 1 Day 7 T Rep 645: 1 B R 645: 1 East 203-8. 619. Com Di pl. C. 57.
But where the pltffs right of action is qualified by a condition subseq^{t} he is not bound to take any notice of it. for this is mere matter of defence. this goes never to the creation of a right of action. It is merely a defeasance & its object is to defeat a right of action — Com Di pl. C. 54. 7 Co 10.11. 1 B R 638. Cr L Di 300 1 H Bl 284. 2 do 574.

So where the covenants are independent, the pltf is not bound to allege performance, secus where the covenants are dependent. Cro. C. 654-645. 5 Co 10. Com 265. 2 Mod 329. 1 Bow Con 359. 2 NR 241.a) Hob 88.

Evy declan must contain certainty. ie the averments must be certain. certainty here means perspicuity. this is necessary that the deft may be enabled to discover what he is to answer; that a precise issue may be formed, & especially that the judgt might be pleaded in bar, if another action should be brot for the same cause – 5 Co 34. 4 Bur 2456. 5 Bac 272. 1 Day 315:

This rule concerning certainty extends to parties – time – place. & subject matter. (Co Lit 303.a) 5 Co 35. Buf 683. Ventr 292. Cro El 78. 97.

No greater certainty is however required in describing the subject matter than the subject will conveniently admit of. there must however be no ambiguity in the terms used. 2 Saund 74. 5 Co 34 Cro El 819. Salk 628. Stra 637.

On this subject no very definite rule can be given. In trover the words were a certain shirt & coils. & this was held suffy certain. tho in detinue ~~the words~~ it would be otherwise. "7 pieces of linen" were held insufft in trover. so "two sheaves of corn. & yet a library of books" was held sufft – "some fish" insufft.

The law does not require so much certainty in in matter of inducement & aggravation, as in that whh constitutes the gist of the action. these are not traversable. Eg. t.q.c. for breaking, house & takeing goods". by inducement in pleading is meant matter introductory to the punishable fact. matter whh is necessary to explain or introduce the punishable fact. Lawes pl. 118. Matter of aggravation is that whh is introduced to show the enormity of the punishable act.

The words said aforesaid &c are words used for reference & certainty whenever there are two antecedents to whh these or similar words may be referred, these words are not suffy certain; the sentence should be the county first aforesaid &c. 2 Vent 66. & 3 R 148. 2 Ld Ray. 888. Com Dig pl C. 18. Cro El 267.

Now a declaⁿ may be ill ~~for~~ in part for uncertainty & good in another part even where there is one count only. Ex. trover for converting 2 pieces of cloth & one is suffˡʸ described & the other not, the pltf can recover for the one piece suffˡʸ described. So in covenant broken one breach is suffˡʸ assigned the other not. the pltf may recover for the breach well assigned. A fortiori where there are two counts & one of them is good, the pltf will recover on the good count. Com D: pl. C. 32. 1 Salk 218. 1 Saund 286. 2 do 372 Lanes 59.

If one declares on a conveyance or contract to the validity of which a deed or writing is necessary by the Com. L. the pltf must alledge the contract to have been made by deed or in writing — for a party must alledge in his declaⁿ all that is necessary or essential to his right of action. (Co 38. 43 b.) 2 Wils 376. Salk 519. 12 Mod 54.

So if one declares on a contract or conveyance not known to the C.L. but created by stat. & required by stat to be in writing, the pltf must declare on this contract as being in writing. (Ex a devise) The same stat that creates the conveyance requires it to be in writing. 1 Ch Pl. 228.

But declaring on contracts on contracts which are valid at C.L. withᵗ writing, but which the stat requires to be in writing the pltf need not alledge that such contract was in writing. Ex. the contracts required by the stat of frauds to be in writing. The reason is that the stat introduces only a new mode of evidence, not a new rule of pleading & as these contracts were known to the C.L. & were good at C.L. withᵗ writing, it was suffᵗ at C.L. to declare on a promise withᵗ writing. 12 Mod 540. Bul 279. Salk 519. Cowp 289. 1 Bac 745 Rol. 7. 212-4.

Still if any of the contracts contemplated by the stat of frauds are to be pleaded in bar the contract must be pleaded as written & signed &c — the only reason is that more strictness is required in this than in declaⁿ — (see years — vide Ch Pl. 228. Chitty Plead.) Salk 519. Bull 279. Ray 450.

If then one declares in assᵗ on a promise required by the statᵗ of frauds to be in writing, & the Deft demurs to the declaⁿ this demurrer admits the promise to be in writing, for no evidence can be introduced under the demurrer of the fact. 7 B.R 531. n 351. a) Salk 519. 12 Mod 540. Comp. 2,89.
A declaⁿ may be genˡ or special all the genˡ counts in assᵗ make a genˡ declaⁿ. but when the terms of a contract are set forth the declaⁿ is special. A declaⁿ on the penal part of a bond is genˡ but a declaⁿ on the condition of a penal bond is special. 4 Bac. 8.

A pltf declaring on a deed is not bound to set forth more of it than is necessary to entitle him to his action, & if there is anything in the deed to avail the deftˢ the deftˢ on oyer may plead it — so of other agreetˢ. Doug 644.
In declaring in assᵗ the word "agreed" answers the same purpose as the word "promised". 2 N.R 62. Salk 663. 3 Mass 160.
I. Joinᵈʳ of Pltfs: When two or more persons are jointly interested in the right to be asserted by action they may & regularly must join as pltfs for a violation of it, & this is the genˡ rule whether the action is in tort or on contract. If there are two or more jt obligees, or promisees they must join. 5 Co 18(b) 19(a) Co Litt 164. 5 T.R 651. 1 Saund 153. 291(f). Such was the rule as to jt tenants suing in ejectᵗ their interest is jt. but in two late cases it has been held that if jt tentˢ tenants in common & coparceners, may all join or sever at their election. The rule always has been such in Conn. It was formerly held that jt tenants must join & tentˢ in com. must sever. 1 East 57. 61. 2 Caines 169.
On the other hand where the right to be asserted is in one person only, another cannot join him in an action for asserting it. & in this case, advantage can be taken of the misjoinder under the genˡ issue — Cro El 143. 1 Leon 315.
In actions by Exʳˢ as such, all who are named in the will must join — even tho one has refused the trust, & then the Exʳ who has refused may be summoned & severed. Toll on Exʳˢ 446. Salk 3. 9 Co 37. 1 Saund 291. g).

The omission of one Exr is pleadable only in abatement. 1 Saund 291(9).

II. If the several rights of two or more persons are violated by one & the same act. they cannot join in an action for this violation of their rights. Eg. If I say B. & C. are both thieves. B & C cannot join. for no jt right is invaded. Cro El 512. 4 Bac 10. Bul N.P. 5. 2 Saund 115. 4 Bac 511. 2 Wils 427.

If of two jt obligees, covenantees, or promisees, one dies the entire right of action survives to the surviving one. & the Exr of the deceased cant join. for the jus accrescendi vest the whole remedy in the survivor. If the covt is with two persons severally & their interests are several each must sue alone, & on the death of one the Exr of decd has a right of action.
1 B & P 445. 1 East 497.

Where the causes of action arise out of the jt act or jt default of two or more they may be joined as defts & if the contract is joint they must be joined. for if one be sued alone there is a variance between the declarn & the contract; but if two join in committing a trespass they may be sued jtly or severally. Salk 262. Hob 6. Bul N.P. 5. 2 B & P 119

Again if two join in publishing a libel they may be sued jointly or severally 2 Burr 988. 2 T.R. 199.

But two cant be joined as defts for distinct wrongs committed by them severally; therefore if A & B should at the same place & time utter the same words of C. C could not join them both in slander. the words of A are not the words of B. Bul N.P. 5. 4 Bac 10. Palm 313. Cro Ja 694. Com. D. 504.

So if one is injured by the several acts of two done at difft times, these two cant be joined as defts. for these acts (Ib).

If two or more persons join & bind themselves jointly by a contract they must all be joined. But if they bind themselves jointly & severally all may be sued together or each may be sued separately 2 Vern 99. Salk 393. 3 Bac 697

But in case of a jt & several contract by three two can't be sued jointly withd the third, for the contract must be treated as wholly jt or wholly several. Yel 26. 3 BR 782. 1 Saund 29. 3 Bac 698.

And if two or more persons bind themselves by one contract not expressing it to be jt or several, the contract is merely jt. 2 Atk 34. Cl B 175. 5 Bur 2611. 1 H Bl 236.

If two persons bind themselves jointly as by a bond & one of them dies the Exr of the decd is not liable at all at law.

But if two bind themselves jointly & severally, the Exr of the decd may be sued alone, but the Exr & the survivor can't be sued jointly. Cart 406.

When an action is brot vs Exrs none need be joined except such as have received the trust. 1 Saund 291 (g) 1 Lev 161. 3 BR 557. Com D. Abt F 10.

Joinder of Actions.

Any number of causes of action of the same nature & between the same parties may be joined in the same declaon, provided the parties sue & are sued in each cause in the same right. Com L 244. Com D actn G. 4 Bac 11.

Each cause of action must however, be laid in the same declaon in difft counts.

Causes of action of the same nature are those whh require at the CL the same judgt altho in civil actions there are two judgts, at CL when the cause of action is such that it must be laid vi et armis & contra pacem, the judgt is a capiatur, but when the action sounds in contract or in case ex delicto the judgt is in misericordia. 5 Bac 190. 1 do 30. Doug 652. 2 Wils 319. 1 BR 276. 1 Wils 252. 1 Ventris 366.

But when the judgt is the same it is not universally tho genly true, that the causes may be joined in the same declaon. But if several causes of action require the same judgt & the same genl issue they may be joined & this rule is universally true, provided the parties sue & are sued in the same capacity. 1 Wils 252. 1 BR 276.

It has been made a ques. whether trespass & ejectment are the same so that they may be join'd in the same declaran. L.G. thinks they cant be joined for the nominal pltf on the record is the pltf & if the lessor of the pltf sues with ejectment for a trespass on the record there appear to be two pltfs in one declaran. Hob 199. 4 Bac 12.

Slander - malicious prosecution - trover &c may be join'd in one declaran in different counts - Doug 652. Cowp 230.

But where the judgt is the same, tho the genl issue are difft yet genly the actions may be joined - Ex. debt on bond & debt on simple contract - again debt on simple contract & detinue Cro Ch 20. 316. 1 Keb 147. 1 Vent 366. 4 Bac 11.

But difft causes of action of the same nature cannot be join'd in the same declaran if the causes accrue in difft capacities to the same person, for the difft capacities make them difft persons in legal contemplation: Ex. Asst for money had & received by Deft as Exr & the same action by Deft as an individual. The misjoinder in this case is called a misjoinder of counts & not of actions Salk 10. 3 T.R. 659. 1 do 488. 4 do 281. 3 B & P 7. 1 Wils 171. Str 1271.

But asst for money had &c for the use of the Deft as Exr & for the use of the testator may be joined for the money recovered will be assets. 3 T.R. 659. 3 East 104.

Neither can a deft be sued in the same declaration on two causes of action, where he is sued in difft capacities. 4 T.R. 349.

Causes of action of difft natures can never be joined, where the judgts are difft the causes of action can never be joined, when one cause is tort & the other contract they cant ever be joined. Salk 10. 1 Bac 30. 1 Vent 366. Ray 253. 2 Bur 1114. 2 Wils 319. Carth 189. 2 Lev 101. 5 Mod 90.

Debt & Account cant be joined & indeed account is so peculiar an action that it cant be joined with any thing else. 4 Bac 11. 1 Bac 21. 1 Mod 42.

Result.

I. When the judgt & the gent issue are the same in both causes of action they may be joined.

II. In gent difft causes of action may be joined where the judgt is the same, tho the genl issues are difft. (The exceptions to this rule are very numerous)

III. Where the judgts are difft the causes of action can never be joined.

Where the causes of actions are wrongfully joined, the misjoinder is called the misjoinder of actions. & this misjoinder is always fatal even after verdict. for there can be but one final judgt in one action & then you have one count requiring a misericordia & one ~~in~~ a capiatur you must have two judgts. Salk 11. Carth 436. 4 Burr. 1 H Bl 108. 1 Chit Pl 209.

Duplicity in a declan & a misjoinder are very difft things a misjoinder consists in improperly joining two or more distinct causes of action in one declan in difft counts, to assert difft substantive rights — But duplicity in a declaration consists in joining one count difft causes of actions. to enforce one entire right of recovery.— the effect of duplicity & misjoinder is entirely difft duplicity can only be taken advantage of by special demurrer.

A declan in trespass for breaking pltffs house & beating his servants per quod &c is good- this is no misjoinder. for the breaking & beating are one continued trespass. & the breaking is laid merely for aggravation. & so in this case the declan wd be good if the per quod were omitted. tho then the consequential damages could not be recovered- Carth 113. Stra 43. 292. 2 Wils 313. 3 do 20. 3 TR 292. 2 do 167. 1 H Bl 555. 2 Salk 642.

Where several actions are between the same parties & they might be joined, on the defts motion the Ct will consolidate these several declans into one declan. This however is at the direction of the Ct, the object is to save costs & the pltff is subjected to the cost of the consolidation. Comb 244. 2 Stra 1149. 1178. 2 TR 639. 1 Chit Pl 196.

When there is a misjoinder the Ct. will allow the pltf on payt of costs to amend his declarn by striking out one count, & now it is held that the pltf may enter a nolle prosequi on the bad count even after demurrer for the misjoinder. 4 Jn 387. 360. 1 H Bl. 108. 1 Saund 285 n (contra) 1 B&P 187. 2 ib 77.

In Conn. the difference of judgts do not exist, still the rules concerning misjoinders are the same here as in Eng.

The declarn must agree with the original writ. the writ gives a name to the action. if the writ sounds in trespass & the declarn in case, the declarn is bad. for trifling differences the modern english practice does not allow the deft to take advantage. Hob. 180. D&St 84. Cro Ca 325. 4 Bac 12-13.

Those facts which constitute the gist of the action must be expressly & positively alledged, not by recital or inference. Stra 621. Bac Ab. Pl & pl. l. 5. Co Lit 303. 2 Salk 630.

According to some the non observance of this rule is fatal after verdict. 1 Mass 96. But in 2 Mass 358. it is determined that a verdict cures such a defect. & Jg. thinks this decision correct. for the fault is not ~~that~~ that there are not sufft facts stated but that they are alledged in an informal manner. & Jg thinks that this defect at the present day cd be taken advantage of by special demurrer — Esp D: 316. 1 Wils 99. 2 Mass 358.

When there is a repugnant averment under a videlicet the repugnancy is aided on genl demurrer or after verdict. 1 Lev 194. 1 Saund 117. 286.

The rule that all material facts must be positively alledged applies to such facts only as are the subjects of a special traverse, however material the facts may be. Eg. the considn in asst is very material. yet it is never alledged directly but always under a whereas — for the considn cant be specially traversed. So again in Trover the pltfs possn or interest is never positively alledged. Where scienter is of the gist of the action. it is never alledged positively for this fact cannot be specially traversed. Hob 166. [illegible] Cro El 211. Com Di: pl. 9. 11. 14. 4 Co 18(c). Again the genl rule above does not hold of matter of inducement. for this can never be the subject of a special traverse. Raf 177. Yelv 70. 4 Bac 13. 14. Lucas 71. 2. 118.

But where any material fact may by the rules of pleadings be specially traversed the fact must be alledged in direct & positive terms. Ex. in cov^{t} where there is a condi^{n} precedent the performance must be directly alledged for it is the subject of a special traverse. & q^{e} in ass^{t}. Gy. thinks that a condi^{n} may be alledged under a whereas. If the decla^{n} is good in part & bad in part & the whole is demurred to. the pltf may recover on that part w^{ch} is good in law: if it contain suff^{t} cause of action. Ex. trover for two articles & one suff^{ly} described & the other not. If the pltf sues on two bonds in two counts & it appears on the decla^{n} that one is not payable & the whole is demurred to. the pltf may recover on the good count. & this is a gen^{l} rule. Cro Ja 104. Hob 198. 1 Co 115. Ray 395. Lutw 59. 1 Saund 28. 2 do 379. Com Di pl. C. 32 e. 36. f. 25. 93.

But in such case if the deft pleads to the action & the jury find entire damages & a gen^{l} verdict. the verdict will be set aside. the judg^{t} arrested. & a venire de novo awarded. the Ct cannot know how much was assessed by the jury on the bad count. 1 Co 130. 3 Wils 177. 2 Bur 988. 1 TR 508. 1 Wils 176. 2 Saund 17. Salk 384.

But if the am^{t} to wh^{h} the pltf is entitled on the good count is ascertained on the record the pltf can have ~~damages~~ judg^{t} to the am^{t} of the damages on the good count. Ex. Decla^{n} on two bonds. in two counts & the jury return a verdict of \$100. & it appears from the record that one was not due. the Ct have means to determine how much was given on the remaining count. Hob 178. Cro J 174.

And in every case where there are two counts, the one bad & the other good & the jury give several damages on each count. the pltf can have judg^{t} on the am^{t} assessed on the good count. tho given the bad count the judg^{t} will be arrested. 2 Saund. 171. (b). Cro E 328. 1 Bulo 37.

But in slander for instance diff^{t} sets of words are alledged in one count. & some of the words are actionable & some not & the jury give entire damages, judg^{t} can^{t} be arrested. for the Ct will intend that the words were spoken at one time, & that the damages were assessed only for the words that were actionable (R. But in criminal proceedings where, some counts are good & some bad & a gen^{l} verdict of guilty is given by the jury. judg^{t} is never arrested. 2 Burr

Dilatory Pleas

By Stat Anne no dilatory plea is admitted until affidavit made of its truth or of some collateral fact wh. may induce the Ct to believe it true. We have in Conn no such rule. 3 Bl 302. 3 Wils 57. 4 Bac 35. (a) 57.

This stat can apply only to extrinsic facts & not to facts appearing on the face of the declarn &c

The first class of dilatory pleas are pleas to the jurisdiction. Carth. 11. 354. 3 Bl 301. Salk 544. 4 Bac 36.

A Ct of limited jurisdiction is one whose jurisdiction extends only to contracts &c wh. arise within their local limits.

When any Ct has not jurisdiction of the subject matter of the suit this is good cause of pleading to the jurisdiction of the Ct. but in this case the deft need not plead in abatement. & indeed it is the duty of the Ct to dismiss the cause on discovering the want of jurisdn. Wents 833. 1 East 352. 10 Co 68. 69.

If then a real action is brot in B R. & the deft should not plead in abatement. on motion by the deft at any time the Ct will dismiss it-

The subject matter is the cause of action. & if the Ct not having this species of jurisdn shd proceed to render judgt the judgt wd be utterly void- Ex. A justc of peace in Conn tries a cause of $100. here is a want of jurisdn of the subject matter-

Again where an action is local it is a good defence. that the cause of action arose in another state or County-

II. Actions are always local where the judgt acts in *rem* for the process of one state cannot run into another. 1 H Bl 146. 2 Bl R. 1058. Str 612. Cowp 161. 175. 181. 2 H Bl 161-2.

III. All crimd prosecutions are local for the crimd laws of one state cannot be taken notice of in another state. crime committed here cant be crime ~~in~~ in another state-

But personal actions but on penal stats are not at C.L. local as regards difft counties of the same state, but crim^l prosecutions are local as regards difft counties—

III. Where the subject is local tho the thing to be recovered is not yet the action is local. Eg trespass quare *clausum fregit* &c—*clausum* is local as between difft counties. 2 Blk 185-6. 4 TR. 503. Stra 646.

And debt or even cov^t vs the assignee of a lease is local. because the contract of the assignee is attached to the land. 2 Cart 579-80. Carth 183. 1 Saund 241 (b). 7 Co. 2 (a). 6 Mod 194.

But debt on cov^t broken vs the original lessee is not local, the contract is personal.

A plea to the jurisd^n is regularly the first in the order of pleadings on the part of the deft. for unless the deft pleads this first, he waives the plea, for by submitting to the Ct any other defence he tacitly acknowledges the Cts jurisd^n. this applies in all cases where the Ct can have jurisd^n by the consent of the deft.

A plea to the jurisd^n must be signed by the deft himself & not by *atty*—(secus in Conn). Co Lit 127 (b) Hob 164. 4 Bac 28. 35. 6 Mod 146. 4 Bac 35. Lawes 91.

But the exception to the jurisd^n cannot be waived where the Ct has not cognizance of the subject matter.

This plea concludes to the cognizance of the Ct. 3 Bl 303. 5 Mod 145-6. Carth 362. Salk 298. Lawes 109.

Where this plea is maintained the only ques. wh the Ct can decide is whether it has jurisd^n or not, & hence J G thinks the Ct can^t on com L. principles award Costs—

In Conn if the Ct dismiss the case on plea in abatement they can award costs. if they dismiss it on motion *ex officio* they do not—(There seems to be no reason for this distinction)—

Disability of the Pltf.

The object of this plea is to defeat the suit by showing that the pltf has no right to maintain an action. Eg. that the pltf is an outlaw. an outlaw is as liable to be sued as any other man. 1 Bac 2. 3 do 761-2. Litt 5197. Co Lit 128 (a). Noyl. 1 Sid 60 –

Outlawry in the pltf is sometimes a good plea in bar. if the cause of the outlawry was a felony it is a good plea in bar. but when the cause is a minor offence it is only a plea in abatement. 5 Co 109. 7 Co 29. 1 Ld Rl 473. 1 Bac 4. Lanes 38, 104.

2. Excommunication, this disables the party to sue until he has obtained absolution. 1 Bac 3. 2 Bac 319. Co Lit 133.7. 8 Co 63. 96.

3. Alienage, this is sometimes a good plea in abatement, vide 4 T.R. 308. 1 Bac Ab. alien (a) – to find who are aliens by the C.L. – all persons born in a foreign state are aliens. 3 Bl 366-72 – But the stat has modified this rule – Alienage is not in all cases a disability, but an alien friend if not naturalized or made a denison cannot maintain an action real or mixed. for he can't hold real prop. but he can maintain a personal action, Co Lit 171. 3 Bl 389. 2 H Bl 162. Ex D 439. Stra 1382, 1 Bl C 371-2.

But the rule that no alien can hold no real prop is modified in some of the states.

Congress is vested with the power to naturalize aliens. The children of native citizens tho born abroad, have all the rights of natural born ~~subjects~~ citizens – U.S. St 6th 79.

The children of persons naturatized born after naturalisation are possessed of all the rights of natural born citizens.

The children of persons naturalized under age at the time of naturatisation, & at that time residing in this country, are entitled to all the rights of natural born citizens.

An alien trader may hold a term for years by Com L. & if ousted of this term, he may sue to recover it. (ie) a term for years in a house not in land). Bac Ab alien (C.). Popl 36. Co Lit 2 (b). 1 Rol 194.

An alien enemy can maintain no action at all here. therefore a prisoner of war, can maintain no action. Strange 1082. 4 Bac 36. 1 B&P 163. 6 T.R. 23. 49. Doug 626. or 649.

But a suit may be maintained on a ransom bill given to an alien enemy. but the suit cannot be commenced till the end of hostilities & when he does sue he must sue in a Ct of Admiralty. 6 T.R 23. Marsh 37. Doug 619. 625. 3 Bur 1734. 1 B&P. 563.

An alien enemy residing here under a licence. safe conduct. or protection from the government may maintain an action. the very effect of such licence is to place him under the protection of law. 2 Ld R 282. Salk 46. 8 T.R. 166. Stra 1082.

Whether an alien enemy not thus protected can maintain actions in a representative capacity is in Eng doubtful, in the U.S. it seems that such action could not be maintained. Cro El 142. 683. 1 Bac 84.

An alien friend as Exr may hold leases & of course may maintain an action for such lease, tho he could not hold such lease in his own right. Cro C. 5 or 8. 1 Bac 84.

On the plea of alienage of pltf. the onus probandi always lies on the Deft. 3 Bl 301. 4 do 380.

In U.S. in Const it is provided that the effect of attainder of treason extends only to the life of the offender & not to his issue. Con: U.S. Art 3. §3.

Pleas to the disability of the Pltf.

That the pltf is a feme covert is a good plea in abatement & only in abatement. 1 Bl 443. Co Lit 132. 3 T R 631. Carth 124.

Indeed it is a genl rule that whatever might be pleaded by way of dilatory plea, cannot be afterwards pleaded. (some exceptions) 3 T R 166.

If a feme sole having commenced a suit, marries pendente lite her marriage may be pleaded to her disability. 1 Bl 316. 4 Bur 39. By our stat the husband in such case may suggest the marriage on the record & proceed with her.

Again that the pltf is an infant & suing witht guardian or next of kin is a good plea in abatement. 3 Bl 301. Co Lit 135(b). Carth 123.

And if an action is bt by an infant & judgt goes for or vs him, the judgt is at com L. erroneous. & a writ coram nobis may be bt to reverse it. In Cro J it was held that if judgt was for the infant it was not erroneous. 2 Saund 213(n). Cro El 4. 428. Carth 123. 1 Rol 287. Cro J 441.

But by 21. Ja 1. If judgt in such case is given on verdict for the infant it is not error unless the deft pleaded to his disability & the rule by stat 24 Ann is the same where judgt is given for the infant on conf. nil dicit or non sum infor. Com Di pl c.1. 2 Saund 213. Cro James 580.

Again it is a good dilatory plea that the pltf is not in esse as a fictitious pltf &c. Com D. Abate e.16.-17. Bac Ab abate f. 1 Wils 302. 3 Bl 301. 1 Ch Pl 135. 6. 1 B&P 44.

Ques. might this plea go in bar. & J.G. thinks it might, for if the pltf is not in existence there can be no cause of action in his favor. — In Ejectment the fiction cannot be objected to —

Pleas of this class viz. pleas to the disability generally conclude to the person of the pltf. 3 Bl 303. Lawes 103. 109. Tidd 585.

The third class. Pleas in abatement properly so called. abatement in law means destruction. Co Lit 134(b). 4 Bac 35. Pleas in abatement extend genlly only to the writ & not to the count or declaran but this is not universally true. 3 Bl 301. 3. 1 Bac 15. Salk 298. Carth 172. 3 Lev 351. 354.

In the Eng practice the writ is altogether distinct from the declan & even in Conn. that which constitutes the ~~declan~~ writ is distinct from that wch constitutes the declan. the date is here common to both the writ & the declan. the requiring, recognizance, duty &c are parts of the writ only —

A plea wch goes to the writ only is a plea in abatement.

If the deft is misnamed in the declaration this is a good plea in abatement. & there only. B&P 647. 3 Bac 624. 3 Bl 301. Lawes 105.
If the writ varies from the declan this is a good plea in abatement, And if there is a variance between an instrument described in the declan & the instrument itself. this variance is good cause of abatement, Salk 659. Com Di: Abt

But in Engd the usual mode is to take advantage of this variance under the genl issue. or by craving oyer. & demurring. but in Conn it is more usual to plead it in abatement.

In pleas in abatement the utmost certainty & precision are required. Com Di: Abatt i. 11. 3 T.R. 185.6. 5 ib 487. 8 ib 167. 2 H.Bl. 530. Cro J 82-

A plea in abatement must in genl give the pltf a better writ. 2 Ld Ray 1178. Com Di: Abt i.1.2. Lawes 37. 103.4. Dout. pl.- introduction 2.)

This rule means that the plea must be so pleaded as to enable the pltf to supply the defect in it or avoid the mistake in a subsequent writ.

Difft causes of Abatement.

These may be either intrinsick or extrinsick

1. Misnomer of the Deft is good cause of abatement, whether the misnomer be in the writ or declaration. (so as to the pltf) 1 Salk 7. 3 Bl 302. 3 East 167. 3 Bac 624.

So by the Eng law the omission of the defts addition is a good cause of abatemt & so it is here. but our law of additions is very difft from the Eng law. the addition is required only in the writ & not in the declar. 3 Bl 302. Carth 14. 6 Mod 105. Cro El 371.

As to place of abode it is sufft to give his late or present place of abode. But by the modern rule of practice in Eng. by which the Cts will not in their discretion grant oyer of the writ, for the purpose of enabling the deft to take advantage of the omission of his addition.

This rule of practice cant exist in this State. 1 Ld R. 440. Lawes 97. 3 B&P 395. 7 East 383.

The stat of additions does not extend to real actions. 6 Mod 85. 3 Bac 618. At com L. the want of additions or even misnomer is not pleadable in in abatemt - But this rule is altered by the Stat Hen 5-
2 Hawk 186. 1 Sid. 40. Cro C 114. 4 Bac 38.

But when one is indicted for felony, a plea in abatement for misnomer or want of addition cannot avail the prisoner any farther than to occasion a short delay. 1 Hawk 243. 2 do 176. 238.

By the stat of additions, a mistake in the defts addition is cause of abatet. 3 Bl 302. Comb 65. 2 Ray 1014.

In Com the only addition required is his place of abode. still where one is sued in an official or capac. character this must be annexed to his name. but not by way of addition. but for the sake of showing how his liability accrued. the official capacity is the inducement to his liability. 3 Bac 620-1. 2 Lut 44. Carth 301. 302.

When an official character is annexed unnecessarily to the defts name it is mere surplusage & even if there is a mistake it does not vitiate. Cro El 332. 3 Bac 621.

The misnomer of one of two co defts is no cause for a plea in abatet Misnomer.
by the one rightly named. for the deft misnamed may admit himself rightly named. & the other cant object. 3 Bac 626. 4 do 31.

If a writ abates as to one of several co defts for misnomer it has been made a ques whether it would as to all. or only as to the deft not rightly named. S.G. thinks that if it appears that the liability of the defts was joint & only joint. the abating quoad one must abate it as to all. but if the liability is several it shd abate only quoad the person misnamed & remain good as the rest. Carth 96. 8 Co 159(b). 3 Bac 628. 4 do 45.

In the plea of misnomer. the deft must state that he is & always was called & known by such a certain name, & that at the time of the writs issuing he was not known or called by the name mentioned in the writ - & by some of the precedents he must traverse that he was never known or called by &c - Salk 6.7. Willes 564. 2 Ray 118. 2 Ch Pl. 418.

It is not sufft to say that the Deft was baptized by a difft name.

If the deft admits in the commencement of his plea that he is called by the name mentioned in the writ, he destroys his own plea. Eg. A is sued by the name of B. & the plea commences, & the said A. sued by the name &c - This is bad. 2 Saund 209(d). 2 Ch Pl. 417-8.

Misnomer. Misnomer as such can be excepted to only by plea in abatement, if he pleads to the action the deft admits himself rightly named, & waives the objection. Carth 124. Salk 2. Comb 18. 6 T.R. 766. 2 H.Bl. 267. 299.

If a person executes a specialty by a wrong name he must it is said be sued by that wrong name, & judgt & Exon must pursue that wrong name & the right name must come under an alias. Stra 1218. 1 Bulst 216. 3 Bac 617. this undoubtedly is authorised 3 Taunt 504. 1 Ch Pl. 249. but Gg thinks it wd be proper to sue him in his right name alledging that he executed & deld the deed by the name of J.N.. In Conn where a Defts is altered as by the death of ones father of the same name the deft is sued as J.S. & as having executed the instrument in the name of J.S. Junr -

It is held by some of our highest authorities that a mistake in the christian name either in the pleadings or execution of an instrument is fatal. But to this extent the rule is not now law - the true rule is this if the action is on a parol contract or for a tort & there is in the writ a mistake in his christian name the writ will abate & the same is true of a wrong sir name - 3 Bro 66. 622. Co Lit 3. 5 Co 43. Cro El 899. Cro J 558. 3 Camp 111.

But if a man executes a specialty by a wrong christian name he may be sued by the name with which he executed it & if the deft pleads in abatement the pltf may reply that he is known by the name by which he executed the bond as by the other name & the deed (the exon of it being proved) is conclusive upon the deft. 1 Ch Pl 440. Willes 554. Cro El 199 n). -

The Defts must always be described in the writ by their proper names & no other description will supply the want of this - Eg. partners cannot be sued by the name of the firm without their proper names. 4 T.R. 508. Leach C. 24. 240 -

Misnomer.

As to corporations the rule is diff^t. they must be sued by their corporate name & it is not suff^t to name the members. Lev Lev. 244. Where the Deft is misnamed in a writ he runs no hazard by waiving the misnomer for if he is afterwards sued by his right name he can plead the former judg^t in bar & aver that he is the same person who was sued in the former suit. Stra 1218. 3 Bac 625. 4 Bac 38.

The misnomer of the pltff is also a good plea in abatement. & the replic^n that the pltff is known by the one name as well as by the other is good 1 East 542.

But the additions of Pltffs are not within the stat of additions. 3 Bac 617-8. 6 Mod 88. 2 Rolle 469. –

In this country there is no case in which the pltffs addition need be given; for ~~stat~~ at C.L. the pltffs degree need not be stated except when the pltff was of the degree of Knight. 3 Bac 617. Comb. 189. But in this state if the pltffs place of abode is misdescribed the writ may be abated, not so by C.L. for in Conn the place of abode gives the Ct juris^n. Coverture of a sole deft is good cause of abatement. Co Lit 132. 1 Sid 141. 4 Bac 39.

But if a feme sole being deft marries pen^e. lite this marriage is no cause of abatement. Cro James 323. Stra 811. Com Di 328. 2 Ray 1525. 1 Bac 9.10.

If a feme covert sued alone w^d avail herself of her coverture she must plead it in abatement, & if she prays a gen^l imparlance she waives her privilege. & she must plead her plea in abatement in person, it can^t be signed by an atty, for consistently with ~~her~~ her own plea she can^t appoint an atty Salk 24. 4 Bac 29. 39. 2 Saun (209.d) 2 Ch Pl. 415. 425;

But her husband may appear in any stage of the proceedings & plead her coverture in bar & if judg^t is obtained he & she may join in a writ of error coram vobis. for his natural rights can^t be waived by her omission to plead, but the writ of error must be in the name of husband & wife. 3 T.R. 631. 5 T.R. 681. Salk 400. 3 Esp R 16 (19).

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That two persons suing as husband & wife, or two defts sued as such are not legally so, it is good cause of abatet, but this is not universally true, for in some cases a husd *de facto* may be sued with his reputed wife. Lanes 105. Comb. 131. 473. Bac Ab. B, & f (a).
And it is held by some that a husd *de facto* may sue with his reputed wife. but J. G. does not believe this— (ib).

Whe the deft is inft & sued witht guardian is no cause of abatement, but he must appear by guardian when sued. & if he is sued alone the Ct will alow time for summoning his guardian if he has one, & if he has no guardian, the Ct will appoint a guardian ad litem. Co Lit 89. 135. 5 Co 53(?). 3 Wil 427.

And it is always the interest of the pltf that the inft appear by guardian for otherwise the judgt ~~[illegible]~~ recovered vs him is erroneous & may be reversed by writ of error. *coram vobis*. Cro J 640. Yelv 58. 2 Bac 218. 3 do 149.

Rule the same when a lunatic is sued witht his conservator Kirby 174.

Co Lit 139. *Third* ground of abatet is death of pltf or deft— at C.L. if a sole pltf
10 Co 134. or sole deft dies the suit abated. & if a final judgt shd be rendered for
Cro El 982. or vs a sole pltf or Deft. the judgt wd be erroneous & a writ of error
1 Bac 7. *coram vobis* wd lie to reverse it by the Exr or heir. this supposes the death to happen before judgt: (*pen: lite*) Carth 338-9. Ray 59. 2 Bac 18.
And if a writ of error were brot alledging that the party for whom de was dead & the shff shd return that he was alive he may himself appear & plead *in nullo est erratum*. altho the writ of error is of course vs the Exrs &c— Carth 339.

So by com L. if one of several plffs dies *pen: lite* the suit abates except in personal actions— when one of the plffs has been summoned & severed & dies after severance— In real actions there are no exceptions. 10 Co 134. 1 Bac 7-8. 6 Co 26.

The principle is that by voluntarily joining the plffs assert a jt right— but when one dies, the jt right is gone—

So too if one of several pltfs die after verdict & before judgt will the same judgt will be arrested. Ray. 463

But where one of several defts die the suit does not abate the death is merely suggested on the record. 1 Bac. 8. Salk 249. Hard 151. 1 Show 186.

Two persons by being joined do not assert any jt right & indeed no right. they may sever in their pleas. one may be liable & the other not. hence the suit may proceed vs one alone on the death of the other. But now by 17 Car. 2. & 8. & 9. Wm 3. the inconvenience arising from death of parties is much removed & in Conn we have a similar stat.

If there are two or more pltfs & one dies pen: lite, the action will not abate. provided the cause of action wd survive to the survivor. & in almost all cases where two properly join the cause of action will survive. but not in all. Eg. In a suit by husd & wife for a tort committed to the wife dum sola. wife dies pen: lite, the right of action does not survive to the husband. tho if the husd had died it wd have survived to the wife.

So too where one of several defts dies pen: lite the action will not abate provided the cause of action is such that it will survive vs the survivor. & in almost all cases the cause of action does survive when two are propy joined 2 Mod 215. 4 Bac 42.

If a sole pltf dies pen: lite in a case in wh the ~~cause~~ right of action wd survive in favor of the Exr. the suit will not in genl abate

In Eng. the suit shall not abate in these cases if the death happens after an interlocutory judgt. but secus suit does abate.

The interlocutory judgt here meant is that of the writ of enquiring of damages – & in Eng if verdict is given & before judgt either party die. final judgt will be rendered nunc pro tunc i.e. as of a day in wh the party was alive. 4 Bac 42. 6 Mod 144. Sellon Ed. 443. 4 TR 431. Salk 42. 1 Sid 385. In Conn the suit will never abate in whatever stage of the proceedings the death happen.

When a sole pltff dies, the suit is kept up by the Exr entering his name as Exr of the pltff & suggesting the pltffs death.

When a sole deft dies the pltff must take out a scire fa: vs the defts Exr to show cause why judgt sh'd not be rendered vs him.

Suppose two pltffs both of whom die at difft times pending the suit. on the death of A. B. becomes sole pltff & if B. then dies B's Exr may enter his name & prosecute.

So if two Defts die at difft times. i.e, if the action be such that the cause survive.

Real actions in case of a sole pltff or deft abate as at C.L. for the stat says if the cause of action survive for or vs the Exr &c. But when real actions are brot by several pltffs or vs several defts, the effect is the same of personal actions - sa vide. 1 Ch. R. 56.

Our Conn stat has received a very liberal construction & where petitioner for new trial dies, the Exr may continue the petition & vice versa if the other party dies. 1 Day 180.

Variance is another cause of abatement. Ex. variance between declar & writ. a variance may be such that a plea in abatement is unnecessary & the Ct will on motion set the declar aside. but this head of abatements is virtually done away by the rule of practice not to grant oyer of the writ. Yelv 5. 1 H Bl 289. 4 Burr. 43. 5 T R 722. 1 B & P 441. Lawes 97.

If the variance between the writ & declar is only in form it must it must be taken advantage of by plea in abatement. but if the variance is in substance, tho a plea in abatement is proper yet not necessary for advantage can be taken of it at any time. & the Ct may dismiss the suit ex officio for the variance. Yelv 120. Lutw 173. Hob 279. Cro El 722. 121, 185, 196.

There may too be a variance between the instrument sued upon, & the description of it in the writ. & this variance is good cause of abatement. 6 Co 14. 2 Wils 232. 4 T R 314-6. 1 B & P 189. Com D: Ab. E. 12.

So if there is a variance between the instrument counted upon & the description of it in the declaration - Salk 659. Com Di Abm. K. Dot pl 1. Com Di Ab - 9. 1.

But the usual mode of availing of this variance is under the genl issue. & in this way the Deft may obtain a non suit. Eg. Instrument described as bearing date 1 Jan - & when produced in evidence, its date is 2d Jan - 1 TR 656. 1 Saund 154, Doug 646. 1 B&P 7. 4 TR 612. 687-8. Cowp 766-7.

When the deft takes advantage of the variance under the genl issue. the instrument is read to the jury & on finding the variance. the Ct will order a non suit.

There are four difft modes in wh advantage may be taken of such variance. I. by plea in abatement. II. under the genl issue. III. by objecting to its admission in evidence under the genl issue. & 4th the deft may pray oyer & recite the instrument on the record. & then demurring to the declarn. for the instrumt recited is taken to be a part of the declarn. when it is set out on oyer on the record. 1 Saund 317. Com Di Pl. 9 8. 2 Wils 339. Hob 18. 2 Stra 1146. Doug 218. 215. Bul N.P. 213. (Kirby 106-7. contra) -

The misnomer of a party may occasion a variance & when it does advantage may be taken of it in any of the preceding modes. but misnomer can occasion a variance only where a written instrument is counted upon. & it wd seem not always there - 4 TR 612. 1 Stark 47.

5th cause of abatet is the nonjoinder or misjoinder -

If a person sues alone where several ought to have been joined the nonjoinder can always be pleaded in abatet. & it makes no difference whether the action is contract or tort. 7 TR 243. 1 Saund 291 a. Salk 4. Co Lit 164(a). 183(a). 195(b). 198(a).

So if several join where one of them ought to have sued alone the misjoinder is universally pleadable in abatement. Cro El 143. 1 Leon 315. Hob 72.

But in some cases the exception may be taken advantage of under the genl issue but not in all.

Where the objection arising from nonjoinder or misjoinder of parties goes in denial of the declan of any material averment in it, advantage may be taken of it under the genl issue — secus not — 1 B&P. 75. 2 Stra 820. Peake Ev 205. 2 TR 282.

Eg — if in an action on contract one sues alone, where another ought to be joined, or if two or more join as pltffs on contracts when one ought to have sued alone, advantage of the non or misjoinder may be taken under the genl issue, for the contract proved in evidence does not support the declan —

Or in these cases if the suit is on a written instrument the deft may demand oyer & demur. 1 Saund 153. 291. (b). (g) 1 B&P 54.

Where one partner to a firm has withdrawn his name from the firm, tho he receives part of the profits he need not join an action for a partnership debt. 1 Esp R 468.

If one pltf sues when another ought to be joined & this defect appears upon the record, the mistake is fatal, so where two sue & it appears on the declan that only one has cause of action, this supposes an action on contract. 5 Co 18 b. 1 B&P 69. 1 Saund 153. 291. (f). Esp Di 314. Stra 1146.

But in an action on tort the nonjoinder of another pltf can be pleaded only in abatet, for the objection arising from the misjoinder does not support the genl issue, for proof that A & B were owners with the pltf does not prove that the deft has not trespassed on the pltfs property. 1 Saund 291. f. g. h. 6 T.R. 766. 5 do 649. Stra 420. 820. Peake Ev 205. 5 East 407. Esp Di 143.

And tho this defect appear on the pltfs pleadings, it cant be taken advantage of except by abatet. 1 Saund 291. (b). n. 4 ad finem. In this case however the deft under the genl issue may show that J.S. owned half the chattle (on wh he trespassed), together with the pltf, not to defeat the action, but in mitigation of damages. 5 East 407. Peake Ev 205.

And if one part owner of a chattle sues alone for a tort. & the deft does not defeat the suit by plea in abatement. the other part owner may sue for the tort. 7. T.R. 279. 1 Esp R. 116. 2 Do 58 &c. 622.

But if two persons sue in tort. where the right of action is in one of them only advantage may be taken of this misjoinder under the genl issue. for the proof that one is the sole owner supports the genl issue. the allegation in the declaration is that A&B. owned the chattle trespassed upon. the genl issue denies the fact. & if this fact is disproved the pltff will be nonsuited. Cro El 143. 5 Bac 200.

If one of two joint debtors ~~are~~ is sued alone on contract the nonjoinder of the other must be pleaded in abatement. unless the nonjoinder appears on the face of the declaration — (& unless it appear on the face also that the person not joined is living). For the fact that the deft promised with another does not prove that the deft did not promise. he did promise, tho he did not promise alone. 5 Bac 261 1. 2 Bl R. 947. 5 T.R. 651. 1 Saund 291. (b). 1 H Bl 236. 6 T.R. 369. Cowp 832. 2 Ld R 368; (Salk 444.)

So it has been held where the action is ex quasi contractu. that the nonjoinder can be pleadable in abatement. (a case is hailed). But T.G. thinks it cannot be pleaded at all, either in abatement or any where else — an action is said to be ex quasi contractu when the inducement is contract. & the gist is tort.

the latest authority is in favor of T.G. opinion. 5 Bac 192. 1 Saund 291. 6 T.R. 369. Carth 623. 2 Ld R 368; 3 East 62. 69. 70. 5 T.R. 649. 651. 1 Esp R. 78-9.

But if an action is brot in one when two ought to have been joined & it appears on the face of the declaration. the declaration is insufft in law & the deft may demur. this supposes the action to be contract. 5 Bac 261 8. 1 Ventr 34. 6 T.R. 796. 1 Saund 291. b & c.

Where an action has been abated for the non joinder of a necessary deft & a new action is bro't including the new deft. the new Deft. may plead the nonjoinder of another deft. & so on ad *infinitum*.

But he who has pleaded in abatet. that another ought to have been joined, can't in the second action plead the nonjoinder of any person not mentioned in his former plea. 3 East 70-1.

If two are sued on a contract made by one only advantage of the misjoinder may be taken under the genl. issue, it goes in denial of the declan. 1 East 48. 2 NR 454. 2 Day 272. Phelps v Battele.

In such a case if the jury find a verdict for one & *vs* the other, on the ground that the former did not promise, the pltf can't have judgt. *vs* the other. for here the verdict itself contradicts the declan. 8 East 162. Carth 361.

And in such case the pltf can't enter nol. pros. as to one. 5 East 44.

If however two defts in a tort action committed by one only the fact that the other is not guilty is not a good plea in abatet. nor can advantage be taken of it at all. Sha. 443. 509. Com. Di. 336. 8 Co 159. Sha 420. 5 TR 649. 3 East 62.

Where several defts are sued as tort feasor *feasures*. the genl. rule is that misjoinder & nonjoinder is not prejudicable of the cause.

One exception. If one is sued in tort arising from the holding of real prop by himself & another, the nonjoinder of the other is pleadable in abatet. — this is the only exception, & tho established by authority, yet it is a mere thing. 5 TR 651. 1 Saund 291. 2 Bl 1142. Com Dig Ab. F 6. 2 East 574. 1 Ch Pl 74-5.

6th Cause of abatet. — pendency of a prior suit for the same cause of action. 5 Co 61. (a & b). 1 Bar 13.

But the suits must be of the same kind or at least concurrent. *ie* both must be adapted to the case or the rule does not apply — Ex. while trover is pending — pltf brings trespass — in a case where both are concurrent — 5 Co 61, a & b. Hob 134. 4 Co 43 (a).

But this does not prevent a party from pursuing diff^{t} remedies at one & the same time, where the law allows him two remedies. Eg mortgagee may at the same time sue the mortgageor in ejectment, on the note &c & a bill in equity for foreclosure.

And to bring a case within the rule, the first action need not be pending at the time of the plea in abate^{t}; to the second if the second was commenced while the first was pending – the second was ab initio vexatious. 1 Bac 13. 4 do 48. Doct pl. 10.

(But if the pltff can show that at the time of commencing the second action, it was manifest that the first could^{nt} have availed the pltf. the second will not abate. for the second is not then vexatious.) Eg. first action clearly misconceived. 1 Root 365. 562.

This is a good plea tho there should be a new deft^{t} added in the second suit & it seems good for all the defts. Hob. 137. Carth 96-7. 1 Bac 13. 14. 4 Bac 49. 1 Show 71.

And the rule holds e converso, if one of the defts in the former suit is omitted. Ib.

If an action brot is abated & another action for the same cause on the same day on wh the first is abated, the legal presumption is that the first was abated before the second was commenced. 4 Bac 49. 1 do 14. Allen 34.

But it is no cause of abatement, that another & prior action is pending for the same cause, in another. Sta 420. Hob 137-8.

This head of abat^{t}, does not apply to indictments, for in case of indictments the Ct has a discretionary control & may quash wh they please. 2 Hawk 190. 275. 369. 1 Bac 13.

If two informations are exhibited by diff^{t} persons on the same day, each it is said will abate the other. & final judg^{t} will be given on neither, for as these private persons are mere volunteers there is no reason for dispensing with the rule that there is no fraction of a day. Hob 128. Moore 469. 5 Com Di. Ab^{t} (3 Bur 1434).

That the writ was unduly issued is good plea in abatt.
Com Di: Abt. h. 1. Laws 106.

Where a writ was returnable to any other than the next succeeding term from the date to whh it can be by law returnable the writ is utterly void. - the defect may be taken advantage of either in abatt or any where else. 3 Wils 341. 2 Salk 700. 1 Root P. 15-6.

If the writ were merely voidable the deft might be held to bail or imprisoned ten or twenty years.

Where the writ is issued witht proper authority, the defect may be pleaded in abatt or the writ may be treated as an entire nullity. - the Ct may dismiss it on motion. 1 Lev 2. Cro El 592. Sidn 304. 4 Bac 43.

Many other defects are causes of abatt - thus if the writ has a defective return. i.e. if the time between the date & the time of the return is to short. In Eng this time must be 15 days. Cro El 80. 1 Salk 53. 2 Keb 461. 1 Sidn 416.

So if the service of the writ is insufft on the face of it. i.e if it appears from the shffs return that the deft has had only 12 days notice, But at C.L. if the return is sufft on the face of it the deft cant by plea in abatt contradict the shffs return. but he must sue the shff for false return. 2 Stra 813. 1 Bl R 393.

In Conn the rule is difft. the deft may here by plea in abatt contradict the shffs return.

Another defect whh is cause of abatt is want of venue in the writ - want of venue in the declarn is cause of demurrer - venue is the place in which the act or contract is alledged to have been done or made. 7. T R 243. 5 Bac 322.

The want of venue is at this day only matter of form.
there is an essential difference between a place laid as venue, & place laid as matter of local description.

Eg. If pltf allege that a battery was committed in a given parish for venue. this in transitory actions is mere matter of form. but if the pltf allege that the battery was committed in the dwelling house of A.B. secus- Stra 694. 2 Saund Rep 31. Saund 82 n 3). 85. 258. 2 Ch. pl 529. 1 Ph. Ev. 231. 2 do 136.

In transitory actions it is no objection to the writ that the venue is untruly laid. but the Ct in its discretion may remove the venue. the venue must be laid in the county in whh the action is brot. 2 Salk 669. 1 Sidr 44. 1 Bac 35. 1 B&P 20. 245. Coup 510. 3 East 329. Com Di: Actn pn 131.

In local actions if a false venue is laid it is good cause of abatet Com. D. abt. K. 17. 7 Co. 2. 3. 1 Bac 34. 5.

In Conn the pltf in local actions must lay the venue as in Engd but in transitory actions if the action is before the Supr Ct or County Ct. it must be brot in the county in whh pltf or deft lives. & when before a single magistrate it must be brot in the town in whh the pltf or deft reside-

8th That action is misconceived is good cause of abatet tho this need not be pleaded in abatt. Hob 197. Com Di Ab. G. 5.

9th. That the cause of action had not accrued at the commencement of the suit, or that the pltf when he commenced the suit had no right to commence the suit. Eg- one brings an action as admr before letters of admn are granted. Com Di: Ab. G. 6. Hob 199. Carth 164. Ld R 325.

Pleas in abatt regularly begin & conclude to the writ. i.e it begins by praying judgt of the writ because &c- & concludes by praying judgt of the writ that the same may be quashed &c.- But when the plea goes to the declan it should begin & conclude to the declan-
When the plea goes to the person of the deft. the

3 Bl 303. Doct. pl. Entro. 1. Gild 184. Lawes 108-9. 160.

The character of a plea has been said to be determined by the conclusion & nothing else 11 Mod 112. 4 Bac 50. 12 Mod 524. 1 Ray 694.. But this does not appear to be the true rule-

The beginning & conclusion determine the character of the plea as a genl rule. 4 Bac 44. 1 Ch Pl 445. 2 Saund 209. (c 1d). 2 Ld Ray 593. 1019.

If the beginning & conclusion sound both in abatt or both in bar, they then witht reference to the subject matter determine its character.

Suppose the plea begins in abatt & ends in bar, or vice versa. if the subject matter pleaded is good only in bar the plea is a plea in bar. 2 Ld Ray 593. 1018. 2 Saund 209. c.d. 1 Ch Pl 445-6.

If matter wh is good only in abatt is pleaded & the plea begins in bar & ends in abatt or vice versa. such a plea if [illegible] as the deft is a plea in bar. if as the pltf is a plea in abatt only. 1 East 636. 1 Lev 311-12. 2 Ld Ray 1218.

If matter wh is good only in abatt & begins & concludes in bar the plea is at all events a plea in bar. Where the fact pleaded is good both in bar & in abatt & the plea begins & concludes diffy. the pltf has his election to treat the plea as a plea in abatt or as a plea in bar. 1 Ventr 36. 3 Mod 281. 4 Bac 60.

A deft cannot at once plead two difft dilatory pleas. or two difft causes of ~~action~~ abatt but difft dilatory pleas may be pleaded in succession. but this does not allow duplicity in pleas in abatt. 1 Saund 107-8. Doct pl. intro. 6. Hob 250. 1 Bac 15. Co Lit 304. (a). In Mass & Conn same. Story's pl 60.

When cause of abatt is pleaded & judgt rendered on it. error is predicable of this judgt as of judgt in chief. but error lies not on this judgt until after final judgt is rendered for notwithstanding the judgt the party may prevail on the merits & then there is no necessity for the writ of error.

But mere matter of abatt is no ground of error unless it is pleaded in abatt for unless pleaded in abatt it is waived. This rule is founded on a genl rule of policy & expediency. 6 TR 766. 3 Bac 157. Doct pl. 5. Carth 124. Co Lt 554. 2 Ld Ray 594. 483.

(one exception. nonjoinder of Defts in Contt).

So to a sci fa or judgt the deft is not allowed to plead anything whh he might have pleaded to the original action. Saund 2 1(a). 1 Salk 2. 310. 3 T R 689. Stra 432. 1 Wils 258. Co Lit 303.

A writ may be abated as to part of the demand & remain good as to the residue. Eg Debt on two bonds & on two Counts & one bond was executed by the Deft with another. 2 B & P 420. Lawes 106. 1 Ch Pl. 444-5.

And sometimes the deft may plead in abatet as to part & in bar as to the residue. but this rule can apply only where there are two Counts. (Ib).

As a plea in abatet does not in genl go to the merits, but only to some informality, a judgt entered on such plea is not in genl a bar to a subsequent action for the same cause. But in some cases judgt in chief is rendered on a plea in abatet & then judgt is good bar to a subsequent action. 4 Co 48.(a). 6 Co 7.8. 46. 8 Co 47.(b).48. Com Di [illegible] 4 (b) 4.

I. If judgt is given for the deft it is that the writ or declart abate & in this the pltff may bring a subseqt action. Yelv 112. Vent 22. 4 Bac 57. 2 Show 484.

II. If judgt is rendered for the pltff on demurrer to a plea in abatemt it is respondeat ouster. 3 Bl 303. 396. 2 Wils 367. 1 East 542.

If an issue in fact is joined on a plea in abatet & issue is found for the pltff the judgt is final. this is intended to discourage false dilatory pleas. Yelv 112. 1 East 544. Doct pl 15. 2 Wils 368. Ld Ray 594. 6 Mod 236.

This rule does not hold in case of pleas in abatemt in indictments for capital offences. 2 Hawk 334. 1 Bac 15(a).

In Conn if an issue in fact on plea in abatet is closed to the jury the issue if found for the pltff causes final judgt. but if the issue is closed to the Ct judgt respondeat ouster is given. 2 Conn Rep 377. If matter of mere abatet is pleaded in bar, judgt in chief is rendered vs the deft. Ld Ray 1020. 1 East 634. 1 Ch Pl 445.

The deft cant demur in abatet: whh means that the deft cant demur for any defect in the writ. Willes 410. 499. Lawes 172. Gilbt. L. C. P. 208. Salk 220. 1 Ld R 97. Carth. 558. 10 Mod 457. Plow 73.)

Upon such a demurrer judgt goes vs the deft in chief for if he will demur he cant afterwards plead & as his demurrer is bad judgt must go vs him. This doesnt hold in capital cases. 2 Hawk 334.

If a demurrer to the declar concludes in abatet final judgt will be given vs the deft. Salk 20.

After a judgt of respondeat ouster, the deft cant plead a second plea in abatet he can plead only the action. Hob. 126. 2 Saund 40-1. Doct Pl. Intro 5. see also Ch. R 427.

But where on judgt that the writ be abated the plff is allowed to amend, the Deft may plead in abatet to the amendment writ. Kirby 5. 6.

By the Eng rule of practice the Deft may not plead in abatt after a genl imparlance, unless the cause of abatt arose after the imparlance, 3 Bl 316. 4 Bac 29. 143. 1 Dox.

The same rule holds after the time allowed in practice for pleas in abatt has expired. Conn Di: Abt i. 18.

In Conn the time for pleading in abatt in the Sup. Ct is before the opening of the Ct in the afternoon of second day of the Ct. In the Cy Ct. the deft must deliver his plea in abatt before the jury are impannelled. 1 Root 564.

But where the law continues an action from one term to the next as in case of foreign attacht the deft is allowed the same time in the second term whh he usually is in the first. - (Conn)

After a writ has been abated for any defect on the face of the writ the plff may amend on payt of costs, so where the declar is defective, & then the writ or declar become new - Barnth tit: Amendt. Conn Di &c -

Pleas to the Action.

Of these there are two. the genl iſsue & special pleas in bar.

Iſsue is defined to be a single, certain & material point iſsuing out of the pleadings or allegations of the Pltff & Defts. Co. Lit 126 (a). Com Di. Pl. 2. 4 Bac 54.

This definition is incorrect in the term material. this is a correct definition of a good iſsue–

This point regularly consists of an affirmative & negative & according to the strict rule of pleading except in the writ of right, there must be a direct affirmative & negative in every iſsue. If then one pleads that J.S. is dead. & the other replies that he is alive there is no iſsue– Co Lit 126. Ments 213. 2 Bl R 1312. 8 BR 278.

But this rule requiring a direct negative in one or two cases has been relaxed– Pltff said that he was born in France Deft replied that pltff was born in Engd– It was held that here was an iſsue. Stra 1179. 1 Wils 6–

In the writ of ~~m~~ right the genl iſsue always consists of two affirmatives, but for this very reason it is called a mise & not a strict legal iſsue. 2 Stra 1179. &. 3 Bl 315.

It is always safer to close the iſsue with a direct affirmation or negative. every other rule leads to looseneſs & uncertainty & it is always simple & easy to form the iſsue in this way.

There has been no departure from this strict rule since the case in Stra

An iſsue in fact is always genl or special. or as some books say common genl– or ~~&~~ special– 4 Bac 54. Lawes 110. Gilb 593 Lawes 113. 8 TR 282. but there is no neceſsity for this three fold division non est fact. is the genl iſsue in covenant. as much as in debt on bond. The genl iſsue is the denial of the whole declarn. i.e. it puts in iſsue all the material allegations of the declarn every thing wh. the pltff is bound to prove. 3 Bl 315. 4 Bac 54.

Pleas to the **Action.** A special issue is one joined on some particular part of the declan where the declarn consist of several distinct but dependant allegations, each of wh are necessary to the pltffs cause of action – the deft may deny any one of them. Co Lit 126(a). Lawes 112-13. 145.

But issue may be taken in a subsequent part of the pleadings & the issue is called an issue or traverse witht any prefix.

To all actions in genl founded on misfeasance the genl issue is not guilty. to debt on simple contract. nil debet. to debt on specialty. non est factum. to debt on scire fa. on judgt. nul tiel record. to replevin non cepit. to disseisin. no wrong or disseisin. 3 Bl 305. 4 Bac 57. Co Ct 257. 3 Mod 324.

To debt brot on penal statute. nil debet. is the proper genl issue, but not guilty is also an admissible genl issue. 1 B R 462. Noy 82. Co Ct 157.

Formerly not guilty was held to be a good genl issue in assumpt & even now this is not a void plea. The pltff cant sign judgt for want of a plea. the pltff must demur. & the plea is aided by verdict. 1 Lev 142. Stra 1022. Crk Di 167. 4 Bac 58.

To debt for rent, nil debet is a good genl issue as well as "nothing in arrear." but the latter is not a good plea in covenant for rent. Cowp 588.

To debt on bond nil debet is not a good plea. for it tacitly admits the bond. & yet pleads nothing in avoidance of the bond whh it thus admits – the pltff should demur. & if instead of demurring. he joins issue on nil debet – the Deft is let into any defence whh wd be allowed him under this plea in debt on simple contract. Mentr 321. 5 Esp 38. 2 John R 183. 8 John 82. 1 Ch pl. 478.

The genl always denies the Count & not the writ. Co Lit 126.(a). 4 Bac 57.

The genl issue concludes to the country & must be tried by the jury & this is generally true of all issues in fact. Co Lit 126.(a). 3 Bl 313. 5.

But this is not universally true thus the plea nul tiel record, with a verification. So when the trial is by certificate inspection wager & battle &c the issue concludes to the Ct with a verification. 3 Bl 330.

The issue nul tiel record as before said concludes with a verification, the Plff then reaffirms the existence of the record. & concludes by praying that the Ct may examine &c 2 B R 443. 2 Wils 113.-14. 3 B&P 44. 5 East 473.

But if the record of a foreign municipal Ct is denied by the plea, it must conclude to the country, for the record of a foreign municipal Ct is to be tried by evidence *aliunde*. & is not to be proved by itself, it cant be tried by inspection, it is usually tried by a sworn Copy - 5 East 473.

The records of foreign Cts of Admiralty are records throughout the world & they are tried by the judges by inspection.

When a record of one of our municipal Cts of record is pleaded as lost by casualty &c, & the record is denied; the plea must conclude to the country. 5 East 473.

And by a stat law of Conn. the parties by mutual agreemt put issues in fact to the Ct - the stat extends only to civil cases.

An issue joined before a single magistrate in civil cases concludes in genl to the court.

But under our new constitution no person can be tried for a crime except by jury. As to the form of tendering an issue &c see 3 Bl 315. Co Lit 126.

The issue is not *joined* until after tendering of issue. the other party does the similiter. 3 Bl 315. Co Lit 126.

The omission of the similiter has been held to be fatal. but in Conn it has been determined that this omission is aided by verdict, for here the *postea* always states that the parties joined issue &c. & judges in Eng have been   - beyond measure to avoid the operation of the rule that this omission is fatal - 1 or 2 Saund 319.(a). 1 Day 392. Cowp 407. Stra 641. 3 Burr 1793.

an iſsue joined closes the pleadings. & when an iſsue is well tendered on one side. it must regularly be accepted by the other - one or two exceptions. 3 Bl 314. Co Lit 126.(a). 1 Saund 338. Carth 86.
But if an iſsue is ill tendered, as if is taken on an immaterial point, the other party may demur.
An iſsue in fact, regularly contains the words in manner & form. now these words are mere form. in others they are of the substance of the iſsue Steph 317. Lawes 20-
2 Saund 319.(n 6). When they are words of form merely they do not put in iſsue the circumstances alledged as accompanying the principal act alledged. i.e. they do not deny these circumstances unleſs it is material that these circumstances be proved. Ex A sues B. in battery & charges B. with beating A with a sword - now not guilty in manner & form &c does not deny the instrument, the sword is material. So if battery is charged to have been committed on the 1st Jany.
But where any particular fact alledged. as attending the principal fact is material. the words in manner & form do put in iſsue this particular fact. Ex where a place is laid as a local description - not as venue. & says that such a treſpaſs was committed in that place the words in manner & form do deny the place. Lit 483. Co Lit 281. 7 Bac 56. 2 East 497. 11 East 226.

These words then do put in iſsue of course those circumstances alledged on the other side wh are material.
An immaterial iſsue is one wh waiving a material allegation on the other side takes iſsue on an immaterial point & wh does not decide the merits of the case. 2 Saund 319. a n 6). 1 Lev 32. Ex Deft traverses merely matter of inducement & leaves the material allegation - or Deft denies what is not alledged in the declar. or traverses mere surplusage. Carth 371.
And such iſsue is not aided by verdict when found for the party tendering it. but vice versa if found ag the party tendering it. 1 Wils 338. 3 Bl 395. Com. 2148. [illegible] Tar 37.

Eg. Again in ass^t. vs an Ex^r. if Ex^r. pleads that he himself did not promise the iſsue is immaterial. Vent. 195. 3. Bl 395.

But if there is no material allegation to be traversed. an iſsue tendered on any part of it, is not immaterial. for the iſsue is as good as the pleadings on the other side will admit of. & in this case after verdict repleader will not be awarded-

An iſsue can^t regularly be joined on a negative pregnant or affirmative pregnant. & at C.L. when an iſsue is thus taken the defect is not aided by verdict-

Now a negative pregnant is a negative allegation wh^h however is still open to an affirmative implication in favor of the other party- Eg. Deft pleads release since the iſsuing of the writ & pltf replies that he has not given a release since the iſsuing of the ~~the~~ writ. this is a negative pregnant for it is consistent with the possible supposition that the pltf released before the iſsuing of the writ. Co Lit. 126(a). 3 Rep. Cro Ja 87.

In this case if the jury find for the deft he will have judgt. but if for the pltf. at C.L. a repleader will in all cases be awarded.

The pltf should have replied that he had not given a release in manner & form as the deft has alledged. & then the time at wh^h the release was given being immaterial. the ques. for the jury w^d ~~have~~ been whether such release was given by the pltf.

An iſsue on a negative is now aided after verdict. by 32 Hen 8. whichever way the verdict is found. Cro Ja 87. 2 Saund 319. (n 6). Gilb C.P. 147.

A negative pregnant is good pleading when the affirmative implied is not suff^t to maintain the action or defence set up by the other side Lanes 114.

A negative pregnant is at this day ill only on special demurrer 4 Bac 98. 2 Saun 319 (n 6) 1 Bac 94.

An iſsue joined on a negative pregnant, includes both what is material & what is immaterial, but an iſsue strictly immaterial, includes nothing material-

An informal iſsue is an iſsue taken on a material point but wrongfully taken in point of form. this is aided by verdict. 2 Saund 319.(n 6). 3 Bl 395. 1 Bur 103. 1 Lev 32. 2 Mod 137. 10.a.14.

The genl iſsue covers the whole declarn. the deft under this may contest every material allegation of the declarn. but it is allowable in some cases to plead the genl iſsue, when the whole declarn is admitted. Eg where the suit is on a contract wch is void to an absolute incapacity in the deft. the genl iſsue may be pleaded & that incapacity given in evidence. 1 Vern Con 99. 1 Salk 7. 2 BR 1082. 3 Keb 228. 6 Mod 311. 12 do 609. 1 Ch Pl 498.

But where a deed or contract is void in its own nature this voidneſs cant be taken advantage of under the genl iſsue, as to the legal fitneſs of such a deed to create a debt & it is altogether void. 2 Bl 292. Esp Di 223.

So where a deed is obtained by dureſs or made by an infant. these facts cant be taken advantage of under the genl iſsue. Esp Di 223. 5 Co 119. Hob 72. 166. 3 Bur 1805. Salk 675. Stra 498. 1 Ch Pl 498-9.

And it is a genl rule of the com L, that when a deed is made void by stat, the special matter wch makes it void must be specially pleaded, for the defense is inconsistent with the genl iſsue. 5 Co 119.a) Hob 72. Esp Di 223. 2 BR 1108.

A rasure in a deed may be given in evidence under the genl iſsue— so loſs of seal. so an alteration made in the deed after delivery— so want of delivery). 5 Co 119. a. b. 11 Co 27.a). Esp Di 223.-4.

In genl matters of fact only are in iſsue under this plea. Esp Di 224. 1 Ch Pl 498.

The CL rule is if the defense is consistent with the genl iſsue it is admiſsable under the genl iſsue. otherwise not.

But in indeb' assumpsit any thing wh shows that the pltff has no right to recover at the time of plea pleaded, may be given in evidence under the genl issue. for the promise laid in indeb' asst is only the legal consequence of the indebtedness. & of course whatever extinguishes the indebtedness destroys the promise so that the plea of no asst means the same as nil debet in debt on simple contract. 2 Bur 1010. Stra 498. 3 Bur 1353. Ld Ray 787. Doug 108. 2 H Bl 143. 1 Chit pl 190-2.

Under non asst the deft may give in evidence - usury. payt award & satisfaction - former recovery - a specialty given for the same - infancy - coverture - duress - award. release. Ld Ray 86. 12 Mod 376. 5 East 230. 4 Esp 81. Com Di Accord -

But as to special asst G. thinks on principle, that these defences should not be given under the genl issue. But the practice is well settled that they may be given in evidence under the genl issue even in special asst. 1 Lev 142. Salk 140. Bull N.P. 152. Ch B. 197-8. Esp Di 149. 5 Mod 18. Ld Ray 566. 12 Mod 377. 1 Mod 210.

But on the principles of C.L. Stat of limitations. tender, bankruptcy & set off can't be given in evidence under non assumpsit. The reason given in the books is. that these latter defences are matters of law wh does not go to the gist of the action. Ch. 3 198. Esp Di 149. Gild 375. Ld Ray 153. 1 Saund 283. n 2.

But the true reason is that these defences affect only the remedy & do not extinguish the indebtedness. Marsh. Sn Coo.

But this liberality of allowing special defences under the genl issue is not allowed in actions on specialties or in actions sounding in tort. 5 Mod 252. Hob 174. 5 Cowp 448. 3 Bul NP 17. Esp Di 84.

A former recovery for the same tort, an award. release &c must be specially pleaded.

In debt on simple contract, the same defences in gen^l may be given in evidence under the genl issue in assump^t. 1 Chit. 53. 566.

It is said that under nil debet the Deft may give in evidence the stat of limitations. and Sw. thinks this incorrect on principle however the rule is well settled by authority. Salk 278. 1 Saund 283. Esp Di 262. 5 T.R. 18. Cowp 588. ~~[illegible]~~

An apt advantage may be taken of the stat. of frauds under the genl issue. by objecting to the evidence. 2 Lev 214. 1 B&P 92. 1 Ch Pl 470.

Every defence to the action wh^h can^t be specially pleaded may of course be given in evidence under the gen^l issue. Lawes 111.

In Conn we have a stat essentially altering the C.L. so in New York &c. the stat in Conn is that the deft may give in evidence under the genl issue any thing except some act of the pltff wh^h goes in discharge or acquittance of the Deft. but the Deft must give notice of any defence wh^h at C.L must be specially pleaded.

We have in Conn an action of Book Debt unknown to the C.L.. the gen^l issue is nil debet. & the stat of limitations may be given in evidence under this gen^l issue. so a release. (2 Lev 215. contra)

The Deft may instead of pleading the genl issue traverse any material fact in the Declar^n. Ex. in cov^t broken if the pltff alledges the performance of a condition precedent the Deft may specially traverse this performance. Com Di. Pl C1. Bac Ab. Pleas N. 3. Co Lit 282. Doct Pl 207. Yelv 125.

A special plea. i.e. a plea alledging new matter amounting to the genl issue. is regularly inadmissible, for such pleading unnecessarily lengthens the record & tends refer ques of fact to the Ct. Ex. in trespass Dft can^t plead specially prop in himself. Hob 127. Cro El 228. 329. Espd 318. 3 Lev 41. 10 Co 95. 1 Vent 249.

A special plea is said to amt to the genl issue when the facts alleged in it go in denial of the allegations in the declan. Nothing ought to be pleaded specially except the legal sufficiency of whh it may be necessary for the Ct to decide.
In Com the Deft in trespass may specially plead title in himself- this he cant do at Lw. witht giving colour to the pltf. But a special plea whh does amt to the genl issue is good, if it contains special matter of justification. 3 Lev 41. Cro El 268. Co Di: 318. 1 Saund 298. Com D. pl E. 17. Salk 107-8.
Again the Ct in its discretion may allow such a plea, where the facts pleaded may breed a scruple in the
ju ie where the facts present a difft ques of L. but this is matter of mere indulgence. Cro El 871. 2 Mod 166. 274.

And in trespass &c a special plea of prop is allowed by giving colour.
Pleading specially what amts to the genl issue when not warranted by these exceptions is sd by some to be ground ~~for~~ of special demurrer
But according to others it is ground for a motion to the Ct to set aside the special plea & enter the genl issue.
12 Co 95 a. Cro C 112. 157. 4 Bac 60. 134. Cro C 871. 1 Ch pl 498. Hob 127. Cro J 165. 2 Mod 274. 5 Mod 18. Co Lit 303. Cl. 2 Day 431.

The latter opinion Sf. thinks correct. But perhaps both these opinions may be right. the regular way is for the pltf to make a motion to the Ct, & if the Ct will not set aside the plea & the Deft neglects to put in another plea & both parties join in demurrer. the Ct will determine the ques on demurrer. 10 Co 94. 4 Bac 134. Jenk 306.
But if the plea on motion has been disallowed by the Ct, the Deft neglects to enter another plea the pltf may sign judgt Cro J 165. 5 Bac 202. 4 Bac 61.

A special plea whh alledges facts whh in evidence wd support the genl issue, does not of course amt to the genl

No special plea whh admits the declarn to be true can amt to the genl issue, even tho the facts alledged wd support the genl issue 1 Ch pl 2 Ray 88-9.

Hence in debt the Deft may plead specially a release, tho a release is good evidence under the genl issue, for it admits the truth of the declan. So payt. 2 Infancy &c 2 Ray 88-9- Salk 394. Cl B 197-8. 5 Mod 18. Carth 356. Gild 591.

By giving colour is meant that the deft admits a bad title in the pltf. so as to enable him to set his own title on the record, the Deft presents on the record a comparison between his own title, & that of the ~~Deft~~ Pltf. & this makes a ques of Law- 10 Co 88. 91. Cro J 122. 3 Bl 399. 4 Bac 102-

The Deft when he gives colour must take care that he gives the pltf a defective title-

A plea stating special facts whh go to support the genl issue & concluding with the genl issue is a good plea

Eg the Deft may plead that the deed on whh he is sued was delt as an escrow & so is not my deed. Gilb 164.6. Salk 274. Ventr 9. 216.

This plea must conclude to the Country 3 Keb 26. Plow 66. Ventr 9. 210. Salk 274. Espi 222. according to some it may conclude with a verification, Gilb Ev 164-5. Doug 112. but there is a solecism in saying that it may conclude with a verification, if it may it becomes a special plea amounting to the genl issue.

But it has been held that such plea may conclude with a verificatn because the pltf may plead over Salk 274.5.

But G thinks that the pltf can never plead over in any other way than by denying it— Such a plea is undoubtedly demurrable. Gilb Ev 164-5.

So Holt says that a special non est fact is impertinent because the Deft takes the onus probandi. but there is nothing impertinent if the deft chooses to do it. 6 Mod 218. 4 Bac 62.

Special pleas in bar.

These are genly defined to be such as admit the facts stated in the declarn & goes in avoidance of them— this is in genl true but is not essential to a plea in bar that it shd admit the whole declarn— so far from it, it frequently concludes with a traverse of some material part of the declarn 4 Bac 2. Lawes 37. 8. 115. 129. & 70-75 & 95. Hob 104. Esp D. 415. 2 Vent 79. Co Ll. 30. 418.

This plea is one whh alledges special or new matter in bar of the declarn & concludes with a verification

It is true that such a plea admits every traversable fact whh it does not deny & goes in avoidance of those whh it does admit. 4 Bac 2-73. Salk 91. 1 Wils 338.

There is one special plea whh neither admits or denies the declarn— a plea in estoppel. 3 Bl 308. Willes 13. 3 East 346. 365. Lawes 38. 130. 140. 146.

In pleading a justification the Deft must confess the fact whh he intends to justify. 1 Saund 28 n 1. 3 T.R 298. (1 Saund 14 n 3). Salk 394. Carth 380. Esp D 313.

By this rule is not meant that the deft must in terms confess the act, the rule means merely that in pleading a justification the deft must not either expressly or by implication deny the fact.

A special plea in bar always advances new matter. & is genly in the affirmative. not always so— as in a negative covt. 3 Bl 309.

Special Pleas in Bar.

Evry thing pleaded is new matter, except a direct & express denial of the allegations on the other side.

And as the plea advances new matter, it must regularly conclude with ~~new matter~~ a verification – but the plea of bankrupcy by 5 Geo 2 may conclude to the country.

The right of replying to new matter as the party replying pleases is regularly enjoyed until a proper issue is tendered. 1 Saund 103. n 2). 2 NR 363. 3 Bl 309-10. Doug 55. Cowp 575.

But a plea merely negative tho it alledges new matter need not conclude with a verification, for no party can in genl be required to prove a negative. Willes 5. Lucas 45.

A plea wh forms a complete & proper issue triable by a jury & not containing new matter must conclude to the Country – Ray 98. Carth 58. 3 Bl 309.

When the deft alledges distinct matter of defence to diffᵗ parts of the declaⁿ he may conclude each defence with a distinct verification, or all with a genl verification. 1 Saund 338. n 6). 339. 1 Salk 312. 2 & Carth 43.

Evy Deft must plead such a plea as is pertinent. Co Lit 285. 303. 4 Bac 83.

Requisites of a special plea.

Evy ~~special~~ plea must contain issuable matter. i.e matter wch is triable on an issue. 2 Wils 74. Lawes 137.8.
Evy plea in wch 2 & part are so blended that they cant be distinctly seperated is bad. 9 Co 25 a) 2 Wils 55. 4 Bac 68 n) Lawes 138.

A plea in bar must answer the whole gravamen or cause of action. if it does not it is ill. Eg action for assault battery & mayhem. & the Deft plead that wch will justify the assault & battery, but not the mayhem. the plea is bad as to the asst & battery as well as to the mayhem..
So in trespass if Deft pleads a release he must add a traverse that he committed no trespass subsequent to the release. 1 Saund 128. 168. n 1). 2 do 50. 127. 216. 3 Lev 375. Hob 327. -8. Cro D 318. Hob 104. 1 Bk 636.

This same principle applies to all the subsequent pleadings. the repn must answer all that is material in the plea. 1 Bk 40. 1 Saund 28 n 337. 2 Saund 12.

But a Deft may plead diffe pleas to difft parts of the declan & here all the pleas taken together must contain an answr to the whole otherwise they will all be bad. Eg. In assumpt for $1000. & the deft pleads as to $500. non assumpsit & as to the residue tender, set off &c. here the two pleas taken together answer the whole.

If matter pleaded as an answer to the whole declan is in st an answer only to part of the declan the plea is wholly ill. Hob 28. 4 Bac 88. Cro J 696. 2 Roll 414.

Every plea is taken to be intended as an answer to the whole declarn unless it is expressly limited to a part.

If the defts plea purports to be an answer to the whole declarn & is in L an answer only to part of the cause of action, the pltf should demur, for here an answer is given for the whole wh is insuffct in L. Ex action for assault, battery & mayhem. Deft pleads a right of arrest. this is no defence to the mayhem. the plea is therefore insuffct & the pltf should demur & the pltf recovers damages for the assault, battery & mayhem. Salk 179. Ld Ray 831. Stra 303. 1 Saund 28 n 3).

But if the deft pleads a defence as a defence to part only of the cause of action. & the defence is in L an answer to part only & the other part remains unanswered, this is a discontinuance by the Deft. & the pltf shd take judgt as for want of a plea & not demur, for the pltf is entitled to an answer for the whole & he shd not accept an answer to part - an answer to part is no answer.
1 Saund 28. n 4 Co 62. Salk 179. 180. Stra 302 Ld Ray 831. 841.
Note if in this case the pltf shd demur the whole action wd be discontinued.
Suppose the defence pleaded to part only in fact - wd have been suffct in L. for the whole cause of action if it had been pleaded to the whole - what in this case must the pltf do? - the plea is confessedly bad - J G. thinks the pltf must not demur, the fact that the matter wd have been a suffct defence in L. if properly pleaded can make no difference. in truth the Deft has not answered the whole - 1 Saund 28 n 3.) 4 Co 62. Stra 303. 1 Selw 4 n Lawes 136.

2. B&P 427. in this case it wd seem that the pltf might demur under the circumstances above. but in this case tho the Deft commenced his plea by an answer to part, but afterwards he professed to answer the whole & the pltf was permitted to demur on account of the inconsistency of the plea.

But these rules do not require the Deft to answer any thing whh is not of the gist of the action. A plea whh answers the whole gist of the action, extends of course to all matters of aggravation. Eg Deft is sued for breaking & entering the pltfs close, & expelling the pltf. the expelling is matter of mere aggravation. if then Deft pleads license of law to enter, this is suffct. & if pltf wishes to rely on the expulsion, he must make a novel assignt in whh the expulsion shall be the substantive cause of action. 3 TR 292. 1 TR 479. 636. 1 H Bl 555. 3 Bl 311. 2 Wils 20. 1 Saund 28 n).

A new assignt consists in alledging with all necessary circumstances in the repn what is stated in the declan genlly. or in stating in the repn as a substantive ground of action. what in the declan is stated merely as aggravation. 3 Bl 311. 1 Saund 299. a n. 6) 5 Bac 213. Laws 70. 163. 197. 240.

A novel assignt in the repn is in the nature of a new declan. for it states as a distinct ground of claim what does not appear so in the declan. Hence the Deft may to the novel assignt plead the genl issue. 1 Saund 299. 3 East 244. 2 TR.

A new assignt must conclude with the averment that the wrongs complained of in the repn are difft from those mentioned in the plea. 1 Saund 299. n)

If then the averment is not true. the deft may plead the genl issue. Lawes 241. 1 Saund 299 (n

It was formerly necessary for a deft to set forth specially all the facts whh make out his defence, however numerous they might have been. Co Lit 303 (C). 8 Co 133. 4 Bac 90.1.

But genl pleading is now sometimes allowed where pleading the particulars wd tend to greate prolixity – Hence if one is bound to fulfil a contract the performance of whh must necessarily consist of a greate number of particulars – the Deft may plead performance genlly. Cro El 749. 916. Co Lit 303. 2 Vent 256. Carth 575 = 1 Saund 117. n 1 / 2 do 410 (n 4). 1 BR 753.

But if an Exr covenants to pay all the legacies in a will & is sued on that covt. the Exr must say that he has pd such & such legacies. & then add that this is all –

Pleas in bar do not conclude like dilatory pleas. they pray judgt of the action –

Traverse.

Traverse is a denial of some particular fact alledged in the pleading, & always tenders an issue. & this may be taken to any part of the pleadings. Co Lit 282. Yelv 195.

Traverses – are genl or special. It is not the form but the extent of the traverse whh makes it genl or special. a traverse denying the whole alledged on the other side is a genl traverse – one denying only part is a special traverse – 116

A traverse preceded by special matter of inducement is a technical traverse —
It is said that a traverse closes the issue, but this is not genlly true. it is sometimes true. but a technical special traverse genlly; & a special traverse always conclude with a verification. 1 Saund 103. 3 Mod 283. Doug 412. 4 Bac 67. 6 Co 24. Stra 871. 1 Burr 321.

There is often a looseness in the books in using the expression closing the issue &c.. Closing the issue is concluding to the country — joining the issue is adding the similit[illegible]

A technical traverse genlly leaves the issue open. the deft then (say) pleads title in himself alledging that I.S. devised to him & died seized in fee. Now the pltff may reply that I.S. died seized in tail absque hoc that he died seized in fee. this is a technical traverse & concludes with a verification. for it traverses only a particular part of the plea — or he may without any inducement deny that I.S. died seized in fee & then the traverse concludes to the country.
Ex. Deft in Assault & Battery pleads son asst demesne. the pltff may reply. that the Deft committed the tort in his own wrong & absque tali causa this concludes to the country. 4 Bac 67-8. 2 NR 364. 1 Burr 317. Doug 90. 412. Salk 4. 1 B&P 96.

It is always proper to conclude to the country where the opposite party merely denies all wh is pleaded on the other side. & in the last case the absque tali causa denies the whole plea in bar.

But a special traverse shd conclude with a verification because as it denies only part of what is alledged on the other side it may be.

Eg In assault & battery Deft justifies as shff by virtue of a warrant, the pltf may specially traverse the warrant & then & then the traverse concludes with a verification.

A genl traverse may in many cases conclude indifferently to the country or with a verifn. but i[illegible] what cases is no where pointed out. 2 B R 443. 2 Bur 1022. 1 Saund 133. Lawes 121.
Q. cannot discover any reason why a genl traverse shd ever conclude with a verifn. for when all wh is alledged on one side, is denied by the other it is impossible that it shd be necessary for the other party answer specially)-

A technical traverse differs from a direct denial in common language, not only in diction, but frequently in conclusion.
Eg. Deft pleads that his co deft was dead at the date of the writ, the pltf replies that he was alive at the date writ. absque hoc, that he was dead. This is a technical traverse & wd conclude with a verifn. but the pltf might reply that the co deft was not dead witht any inducement & then the traverse concludes to the country. & where there is no occasion for an inducement, the pltf shd adopt the latter form. 2 Saund 206. 1 Do 103 n 1) 2 N R 364. n 1

Ex. Again. Deft pleads usury, the pltf may technically traverse the plea, thus that the agreemt was upon good & lawful consideration reserving 6 per ct & no more absque hoc: that it was corruptly agreed, & conclude with a recipn or pltf may simply deny the usury. 2 Bur 1022. 2 T R 439. 2 Stra 871. 1 Bur 324. Ray 98. 2 T R 364 n)

This latter traverse as it concludes to the country & forms a complete issue, is not usually called a traverse but an issue Lawes 117.
Where there is a technical traverse, the issue is formed by the opposite partys affirming over what is traversed & concluding to the country.
But is a wrong conclusion of a traverse, a fault in substance, or in form.? Ray 99. Cro El 117. or 164. 3 Mod 203.
At CL it seems to have been a fault in substance but since the Stat of amendments it seems that it is only a defect in form. 1 Saund 103. n 1 - 285 - n 5. 2 do 190 n 5

When a denial is in the common ~~form~~ negative language it is improper & demurrable to superadd a technical traverse, 4 Bac 69. 2 Stra 871. Cro El 755. 1 Vent 101. Ray 98. 2 Saund 188.

Where one party alledges new matter inconsistent with material allegations on the other side, he must follow up his plea with a traverse of these allegations. Hob 103. 4 Bac 67. 68-70. 1 Wils 253. 1 Saund 22. text & n 1. 2 do 207. n 4. 209. n 8. 3 Bl 310.

One class of exceptions, whenever in answer to a negative allegation it is necessary to set forth affirmative matter specially. the party must not traverse the negative allegations with wch his are inconsistent but must conclude with a verifn. Ex actn on arbn bond Deft replies no award. the pltf replies an award setting out the award & assigning a breach. now this is inconsistent with the plea. but the repn shd not conclude with a traverse. Hob 233. 6 East 556-7. 2 B&P 362. Lawes 150. 1 Ch. R. 189.

So in actions on administration bonds.

It is stated in some books that every traverse (*special*) must have a proper inducement or it will be a negative pregnant but this rule is not universally true, & in strictness is incorrect. the rule was derived from a case in Hob. 321. in some cases a special traverse witht an inducement will be a negative pregnant. & when it wd so be pleaded. he shd precede his traverse with an inducement. Eg. In assault & battery. the Deft justifies that by virtue of process he *molliter manus imposuit*. & now if the pltf shd reply that the Deft did not gently &c. here the reply is open to the implication that the Deft did not lay his hands upon him at all. he shd reply that the Deft committed an enormous battery. absque *hoc*. that he gently laid his hands &c. Com. Di. pl. G. 2. 3 m. 16. Lawes 118. Hob 321.

But if Deft pleads that his co Deft was dead the pltf may reply that the co Deft was not dead witht any inducement.

When a party merely confesses & avoids, a traverse of what he thus confesses & avoids is clearly improper. being inconsistent with the admission whh is made by his own plea. Cro Ja 271. 2 Mod 168. Carth 384. Yelv 157.
In such cases the party confessing & avoiding) must conclude with a verification & with a traverse. 1 Wils 253. 3 Bl 309. Saund 22 n). 2 Do 5 (n 3).

A traverse preceded by an inducemt where the inducemt & traverse both go to the same point is but a conclusion from the inducemt. & if the traverse is not a conclusion from the inducemt the inducemt is wrong in form at least.

When a traverse with a verifn is tendered the issue is formed by the opposite partys affirming over what he has affirmed in his plea in bar. & conclude to the country) Salk 4. Co Lit 126 a) 4 Bac 67-8.

An issue joined on an absque hoc must have an affirmative after it. This does not mean that there must be an affirmative after the issue. it means merely that where an issue is joined by a technical traverse

6l an negative allegation cant be traversed with an absque hoc. for if it should be the issue wd be upon two negatives. Ex Actn on contract where pltf was bound to give notice as a condn precedent. Dept alledges that pltf did not give him notice- now if the pltf shd reply that at such a time he did give notice. absque hoc. that he did not give him notice.
This is only a mistake in form.

The omission of a traverse where a traverse is necessary was at Ca. matter of substance, but since the Stat. of amendts it is mere matter of form. 2. Str. C.P. 4 Bac 50. 1 Leon. 43-4. 1 Saund 103(a).

There cant be a traverse upon a traverse where the first traverse is material. A traverse upon a traverse is a subseqt. traverse going to the same point as is embraced in a prior traverse on the other side. For where one party has tendered a material traverse, the other party cant leave that traverse & tender another traverse upon the inducemt. of the first which goes to the same point, *i.e.* same ground of claim or defence. *Hob* 104. Salk 222. Ld Ray 121. Com D. pl. G. 7. 1 H.Bl 483.

Eg Deft pleads title, alledging that J.S. died seised in fee & devised &c. the pltf replies that J.S. died seised in *tail absque hoc* that he died seised in fee. Now the deft cant say thus J.S. died seised in fee *absque hoc* that he died seised in tail. If he might the pltf might surrejoin &c *ad infinitum*. The deft must rejoin that J.S. died seised in fee & conclude to the country.

But a traverse after a traverse is good even tho the traverse first taken was good. A traverse after a traverse is that whh goes to a difft point from that embraced in the first. *Hob 104*. Co Lit 282. Com D. Pl. G. 18. G1. 1 Ld R. 535.

Eg A sues B in trespass quare, B pleads a license on a particular day, with an *absque hoc* that he was guilty of a trespass on any other day. Now the pltf is not bound to join in this traverse & affirm that the trespass was committed on a difft day from that mentioned in the plea. he may do this if the trespass was in fact committed on a difft day from the one mentioned in the plea, or he may traverse the *license*.

But if the first traverse is on an immaterial point. there may then be a traverse upon a traverse. Ex Trespass. alledging that Deft cut & sold the pltffs trees. Deft pleads that he cut with license absque hoc that he sold them. the pltff is not bound to join in this traverse. he may therefore plead to the inducement viz to the license. Hob 104. 1 H Bl 376. 406. 1 Saund 202 4 T R 440. Carth 116. 4 Bac 73.

One exception to the first genl rule that there cant be a traverse upon a traverse where the first traverse is material this where a local action is brot. or a transitory action & Deft pleads.

Steph 101. Com D. pl G. 18 4 T R 439. 5 do 367. Cro El 99. 1 H Bl 405. Ld Ra 182. 1 Ch pl 597.

When the cause of action alleged in the declan is divisible so that by proving part he wd be entitled to a recovery. the Deft cant make that part of his plea which answers only part of the demand.

Ex Debt on simple contract for $100. B pleads as to $50. payt absque hoc that he owed more than $50. this is a bad plea. bec if such pleading was allowed the Deft by pleading falsely might always defeat the pltffs action. for if this traverse is well taken he must join in the traverse & if it is found that the Deft owed only $50. tho nothing had been pd yet the Deft must have judgt. for this issue will be found for him by the supposition. Deft should have pleaded as to $50. payt & as to the remaining fifty nil debet. 1 Saund 267. 9. Yelv 225: Com D. pl G 21.

When the traverse & inducemt go to diff points. (the traverse & the inducemt). the joining in the traverse admits the inducemt. But where they go to the same point. joining in the traverse never admits. but necessarily denies the inducemt

But for the purpose of avoiding this admission in the indict. the party to whom the traverse is tendered may use a protestation 4 Bac 68. Com D pl.

But a protestation is of no use in the cause in wh it is used the use is to prevent the Deft from being concluded hereafter in any subsequent controversy by this admission or record.

It is never necessary for the opposite party to answer a protestation. indeed it is no part of the pleadings Com D. pl (n) Lawes 141. 3 Bl C 311. Co Lit 126.

A party tendering a traverse admits all facts wh he does not traverse: he on his part may also use a protestation to avoid his being concluded in any subsequent controversy. & in this case these untraversed allegations are admitted only for the purpose of the present suit. 4 T R 441. Lawes 141.-3. 3 Bur 1023. 5 Mod 136. Lit S 192.

A protestation is the only mode of denying those allegations wh can't be traversed. Plowd 276(b). Lawes 141.
A protestation is never the subject of a demurrer for it is no part of the pleadings. Com Di pl (n) Lawes 142.
Lawes says in genl a protestation can in no way avail the party protesting, if the issue joined is found ag. the one who protests, but the issue can't affect the protestation. Lawes 142.
A traverse can be taken only on a material point & if taken on an immaterial point it is demurrable. Comb 321. 1 Saund. 5. 28. 6 Co 24(a).
If however the party to whom an immaterial traverse is tendered wd demur, he must by 27 Eliz & 4 Anne demur specially - secus at C.L. 1 Saund. 14 (n) 31. n/ 2 Do 247. Cl. L. 319.(a) 1 Stra 694. Yelv 195. 1 Bur 94.5.

A traverse can be properly taken only on an issuable point
a point may be materiable tho not issuable. matter of
Law therefore can^t never be traversed. 1 Saund 23. n 1. 2 H Bl 182.
Cro El 201. 169. Com Di. pl G. 14. 11 Co 86. 1 Saund 159. 1 Do 22-3. 268. a(n).

So a per quod or virtute cujus. is not traversable. 1 Saund 23
n 5). 298. n 5. Ld Ray 410. 11 Co 60. 2 Lev 609.
Yet the pltff may deny the existence of the warrant. [illegible]
1 H Bl 574. 403. 2 Lev 182. 4 Bac 8. 68. 1 H Bl 596.

A traverse must be taken on a single point. i.e on one
single ground of claim or defence. a traverse taken on
more than one point is bad for duplicity. but the traverse
may include several parts if they all go to one ground of
claim or of defence. 1 Bur 320. 1 B & P 80. & 1066. Bul 93. 3 Lev 40.
4 Bac 75.
But if there are two distinct points both of wh^h. are material
in the pleadings on either side: either may be denied.
6 Co 24(?). 1 Wils 338. Com Dp G 11.
Nothing except what is alledged or necessarily implied in
the pleadings on one side can be denied by the other.
suppose in a pt required by the stat of frauds

1 Saund 3. 2. n 4.
206. 2 do 10. n 14.
Ld Ray 629.
Com D pl G. 8, 13.
Carth 99.
2 Vent 99.
4 Bac 68. 75.

But a traverse taken within this rule is ill only
on special demurrer. 4 Bac 75. 2 Ld Ray 230. 1 Saund 312
(24).

But any issuable point appearing in the pleadings may be traversed tho it is alleged by way of recital &c. tho in genl it is best when a traverseable fact is thus alleged to demur. 2 Saund 206. a). 21. 22 n 1. Com D. pl g. 11. Cro El. 165. Lucas 38.

When a party justifies or avoids as to any part only of a cause or defence & wd traverse the residue his traverse must be coextensive with the part unanswered. Hob 104. 2 Wils 6. 8. 4 East 415. Salk 222. 1 Lev 241.

If licence or justifn is laid on the same day as is laid in the declarn there is no need of a traverse of prior or subseqt time, for here the trespass is prima facie identified & the plff may new assign if he insists on a subseqt or prior trespass. 5 Bac 206-7. 3 Salk 42. 2 Saund 5. 2 Ch Pl 592. 1 Saund 14. Stra 554.

If a justifn &c is pleaded on a diff day from that alledged in the declarn he shd add the quae est eadem transgressio. but in the last case there is no necessity for the quae est &c (Qu) 1 Ch Pl 534-5. 2 Saund 5 n 3. 2 Ch Pl 560-61.

A traverse well tendered on one side always obliges the opposite party to join in it whenever the inducemt & traverse go to the same point: when they go to diff points otherwise Hob 104.

In many cases there is no need of an inducemt - in others it is indispensible - First. an inducemt is something necessary as to prevent a negative pregnant.
II. 'Tis important to answer the purpose of a protestation.
III. Where the inducemt & traverse go to difft points. the inducemt is indispensible to make out a complete defence-

The inducemt must consist of issuable matter. for where the inducemt & traverse go to the same point, the traverse is a conclusion from the inducemt. the inducemt must therefore consist of issuable matter or the traverse will not. & where they go to differt points, the is traversable & therefore shd consist of issuable matter. 2 Lev. 32. Cro E 936. 4 Bac 68.

A traverse genly pursues the terms of the allegation traversed. But a traverse in this mode is not always right. Eg Deft pleads release given since the date of the writ. the pltf shd not traverse in the words of the plea for if he shd the traverse wd amt to a negative pregnant. The traverse shd be with an inducemt or pltf might deny the release *modo et forma*. Co Lit 126. 2 Saund 319. n 6. 4 Bac 58. Com D. pl. G 5.

If an action is brot for money on or before a given day & the deft pleads payt before the day. the pltf must traverse the payt on, before, or after the given day. — this is perfectly anomalous. 2 Bur 944. 2 Wils 173. 2 Saund   4 Bac 66. Stra 994.

But where money is payable on a particular day. deft pleads payt on that day: the pltf merely denies paymt in manner & form, & these words, "manner &c" deny the day so far as it is material — 2 Wils 150. Com D. pl c 37. 2 Bur 944.

Where money is payable on a particular day, the deft tho he actually pd the money before the day shd plead payt on that day. & it wd be demurrable to plead paymt before the day. Com D. pl 1. Lev. 120.

Duplicity

Duplicity is a fault in pleading because it tends to prolixity & embarrassment. A plea is double when the plea consists of several distinct & independent matters going to the same part of the claim or defence or to the whole claim or defence Co Lit 304. n). 3. Bl 311. 4 Bac 118. 1 Saund 336. 3 [illegible] 192. 1 do 180. Hob 255.

Eg the Deft pleads to an action of trespass a justificn & release to the same trespass. this is bad pleading on acct of duplicity.

But the giving of difft answers to difft parts of a demand is not duplicity. Co Lit 304.(a). 4 Bac 118-19. 125. Lawes 101-3.

And if there are several Defts in one action each may plead for himself one defence for the whole, & difft defences to difft parts. Hob. 70. 2 Stra 1140. 610. 2 Ld Ray 1372. E. Ld 414-5: 419.

But where two are sued together on contract, they cant sever in pleading unless they plead difft defences. i.e they cant sever & both plead the genl issue &c. for they cant be injured by joining. 2 Esp 75: 5 Do 47. 1 Saund 207.

But they may plead in this case severally, provided they plead several defences.

Every plea must be single, entire, connected & confined to a single ground of demand or defence. But this single point need not of course consist of a single fact. for several facts may be necessary to constitute one single ground of claim or defence. 3 Bl 311. Thus Deft pleads in bar, award of arbitrators here the Deft must set forth all the particulars of the submission. the hearing. the award made &c all these are necessary to establish one ground of defence. 1 Bur 320. 2 Bl 1128. 3 Salk 142.

So in pleading probable cause in an action for malicious prosecutions the Deft may allege all the circumstances wh. ~~the~~ go to create ground of suspicion Cro El. 134. 871. 900. Esp. Di: 533-7.
And here the replication de son tort demesne absque tali causa traverses the whole.
So all the grounds of suspicion on wh. an arrest was made may be specially set out. 1. T.R. & Hawk 121.
But if in an action for false imprisonmt the Deft justifies on the ground that the plff committed a certain offence. the Deft can't plead that the plff committed murder one offence is suffic't to make out the justificn Esp. Di: 535-6.

But where the fact relied upon as a defence is the consequence of another fact, both may be pleaded. Exr pleads plene administravit. & so has no assets. Com. Di. pl. E. 2. Plowd. 141. a. 1 Burr 320.

Diff. counts in a declan each count being single never make a declan double, & this is the case where several counts are inserted to enforce distinct or the same rights of recovery. For each count purports to be for a distinct cause of action. But if the diff. parts of any one count require diff. answers. the Count is double. Eg. diff. causes of action in one count.

But surplusage never makes a plea double. the Ct treat it was not in the pleadings. Eg. Deft pleads paymt & that he was always ready before that time to pay. 1 Sid. 175. Kel. 661. 2 Wils 340. 4 Bac 119.
To make duplicity in a declan it is not necessary that the diff. grounds of action shd be incongruous. Com. D. Pl. C. 38. ibid. 94. 1 Vent. 365. Cro. C. 20. 2 Ray 404.
Eg. A. promised to deliver to B. all the grains from his brewery.
&

In actions on penal bonds only one breach at C.L. could be assigned. Com Dig Pl C 33. Comb 297. 1 Bac 544. 3 Salk 108. 2 Wils 267. Vent 114 Cro. C. 176. 1 Bac

But in covt broken the pltff at C.L. might assign in one count as many breaches as he pleases 4 Bac 131. 1 Bac 144.

In Conn the pltff may & always might allege as many breaches as he chose of the condition of the bond. for in Conn the penalty can never be recovered, & now by 8th & 9th Wm 3. the rule is the same for the most part in Eng. 2 Burr 826. 2 Wils 377. Cowp 357. 8 T R 126. 459. 2 Bl R 1016.

The rules of the C.L. still exists with regard to duplicity in in declarn but by the 4 & 5 Ann. the Deft may plead, with leave of the Ct, as many pleas as he wishes, but each plea must be distinct & single. Lawes 27-8. 4 Bac 121. 2 Ld Ray 1195. 3 Bl 308. Espi 319.

When a Deft pleads several distinct ~~pleas~~ defences. the pltff may answer each separately. In Conn in 1815 a similar stat to that of ~~[illegible]~~ 4 & 5 Ann was made.

These statutes comprehend no other than pleas to the action. The pltff cant make two repns to one plea & the deft cant make a double rejoinder to a single repn. Com Dig Pl. E. 2. 4 Bac 121.

By 27. Eliz advantage can be taken of duplicity only by special demurrer, & the duplicity must be specially assigned. i.e. the party demurring must show wherein the duplicity consists 1 Saund 337. Com Dig E. 13. E. 2. Salk 219. 698. Wils 219. 2 Ld Ray 332. 798. 1 Lev 76. 4 Bac 119.

If two answers are improperly made in the repn & the Deft does not demur he must rejoin to both the answers or his pleading will be ill. Vent 272. 4 Bac 119.

In this case the Deft may traverse both the replns but each traverse must be single.
The rule requiring a special demurrer to duplicity does not extend to misjoinder of actions. Salk 10. Ray 233. 3 Lev 99. 1 BR 274. 8 Co 87. Comb 333.
It is a genl rule of the C.L. that when a party declares upon or otherwise pleads a deed & makes title under it he must make profert of it. Com Di Pl O. 3 BC Ab 22. Lawes 96.7.
By making title under deed means making the deed the ground of claim or defence

This profert is required that the other party may have oyer of it & demand a copy of it. & that the Ct may have inspection of it 6 Co 38. 11 Do 93. Hob 233. Com Di Pl.P. 4 Bac 109. 113.

And the adverse party is presumed to be unable to plead properly witht the deed & he cant be compelled to plead witht oyer when oyer may properly be demanded. But if he pleads witht oyer he waives it. Salk 119. 6 Mod 283. 4 Bac 113.

Profert is regularly required of no other instrument than a deed. for according to the strict notion of the C.L. bills of exchange & promissory notes &c are not instruments. but merely evidence of contracts. 6 LB. 185. 1 Sid 532. 1 Salk 215.

In modern practice however tho the pltf is not bound to make profert of Notes &c. yet the Ct will if the deft requests it furnish the deft with a copy of the note. (96).

In Conn notes not negotiable & other writings in genl which contain express covenants are considered as deeds.

If a right acquired by deed might have been acquired witht deed, he who claims title under it is not bound either to plead the deed or make profert of it.

But when the right could not pass witht deed he who claims the right in his pleadings must plead the deed & if he makes title under it, he must make profert of it. 6 Co 38. a. b. 1 Buls 119. Co L 143. 1 Saund 9 (a). 3 T R 156.

But tho the right might pass witht deed yet if the party pleads the deed & makes title under it, the deed must be pleaded with a profert. Lutw 64. 4 Bac 110. Lawes 47.

Tho a party pleads a deed, yet if he does not make title under it, he is not bound to make profert of it. for a deed may be pleaded as matter of mere inducemt to the claim or defence. Eg. A. brings an action vs B. for fraud in the sale of goods & alledges that the sale was by bill of sale, here the bill of sale is not the ground of claim & profert need not be made. 8 T R 573. 10 Co 92. 8 Co 38 a. b.

When a party pleading a deed does not make the deed a ground of claim or defence, the adverse party cant give any answer to the deed. because it is mere matter of inducemt. oyer therefore can do him no good. & therefore there can be no necessity for makeing profert.

But it is not universally true that he who pleads a deed & makes title under it, must make profert of it. Eg. A stranger may make title under a deed. & yet he need not make profert, for the deed is presumed not to be in the strangers power. Eg. Deft pleads a deed from A. to B. & that the Deft as agent to B did the wrong complained of &c. 10 Co 94. 1 Ver 394. 3 Lev 80. 1 Saund 9. (a).

And this rule holds genlly as the phrase is, of any one who comes in by the operation of law. thus tent in dower may plead conveyance to her decd husband as a ground of her claim. & yet she does not come in as party to the deed, but by operation of law. & therefore she need not make profert. Co Lit 225. 5 Co 75. 4 Bac 110. Jenk 305.

But this rule is not universal. Eg. tent by the courtesy must plead the conveyance to his decd wife with a profert. for he has a right to his wifes title deeds during his life & may detain them from the heir at Law. 10 Co 94. Co Lit 226 (a). 4 Bac 110.

But privies to deeds must regularly make profert of them in all cases where the original party wd be bound to make profert. Eg. heir at law. & Exr. Co Lit. 267. 317. 10 Co 92-4. 4 Bac 111.

But a party pleading a record is never bound to plead it with a profert. for a record is never private prop. & they are not at the control of any person whatever. 6 Mod 237. Bull 252. Peak Ev 28. Gild 529. Co Lit 225.

Letters testamentary must be pleaded with a profert. these are not records. they subject to the control of the Ordy. Lawes 96.

If a deed is lost by time or casualty it may be pleaded & title made under it witht profert. but he who thus pleads a deed destroyed must alledge specially the loss &c, or his pleading will be ill. 5 Co 74(b) 75(a). 3 TR 151. 10 East 55. 1 H Bl 254. 2 Co 243. 263. Peak Ev 29. 1 Wils 16. 2 Stra 1106.

Anciently relief in such cases was sought by bill in Equity & now where the party pleading a deed wishes to obtain a disclosure

1 Mod 246
1 Vern 14. 15.
1 Br Ch 218.
Hob 109.

So if a deed pleaded by one party is in possession of the adverse party he may make this an excuse for not pleading with a profert. 10 East 56

He who pleads a private stat or letters patent is not bound to make profert for these are records Doug 476.
If in case of loss &c the pleader make title & profert the opposite may then insist on oyer & the pleader in such case must fail. 1 Saund 9.a) 1 Wils 16. & 3 R 153 (n).
There is however a remedy for this under the stat of amendments.
In Conn profert is never necessary, for our Cts hold that oyer may be demanded whether profert is made or not. 1 Root 566.

Formerly the omission of profert was matter of substance but now by the stat of amendts it is ill only on special demurrer Cro C 32. Hob 301. Cro El 217. 4 Bac 113.
Profert being made the opposite party may demand to have the deed read & demand a copy of it to made out by a proper officer at his expense. 3 Bl 299. Hob 217. 4 Bac 113.

But tho' a deed is pleaded with profert. yet if the profert was wholly unnecessary & title not made under it, the profert is surplusage. & the opposite party cant demand oyer. Salk 497. Gilb 529. 2 Wils 395. Doug 476-77

The granting of oyer when it is of not of right demandable is not error. but refusing to grant it when it ought to be granted is error. Salk 498. 1 Saund 9
But to take advantage of this error the party craving must enter his prayer on the record, & this entering the prayer is so far regarded as a plea. as, that the other party may demur or plead to it. &c.

The party to whom oyer is refused may also file a bill of except-ions stating the facts.

1 Saund 9. (6)
Salk 498.
6 Mod 28.
Plow 509.
Ray 486.
1 Bac 325

On oyer obtained the party obtaining it may enter the deed on the record verbatim & thus take advantage of any condi-tion &c which the opposite party has not stated in his pleadings or he may take the advantage of any variance, defect, illegali-ty &c appearing from the deed — or for a variance the deft may demur. 3 Bl 299. 6 Mod 28. 4 Bac 113. Lawes 98-9.

If the insufficiency or illegality appear on the face of the deed the deft may demur. 2 Wils 342. Lawes 99.
But if there is any extrinsic matter of defence the Deft may allege this in his plea.
If the party obtaining oyer of ~~the~~ it deed recites it falsely the adverse party may sign judgt as for want of plea — for the party craving oyer impliedly undertakes to recite it truly if at all & this breach of his implied undertaking annuls his plea. Or the pltff may have the deed enrolled in his repn by a proper officer of the Ct. & then demur. 1 Saund 9(6). 316-7. 4 T.R. 370. Carth 301. Comd. plea. 1 Stha 227.
Departure — is a dereliction of a former claim or defence for another distinct form & not fortifying it. 3 Bl 310. 6 Lit 303.4. 2 H Bl 280. Bull 17. Stha 422.
Eg. If matter first pleaded is of C.L. — a subsegt plea of a particular custom in support of the first claim or defence it is a departure. 1 Lev 81. 1 Keb 469. 512. 4 Bac 123.

So where the first plea asserts a C. L. right. & a subsq^t plea alleges a stat. right. this is departure.
So if one sues in com. form for a trespass to cattle & the defence is that they were taken damage feasant. rep^n that they were distrained out of the county by Deft is bad for this is a stat. offence. 3 Lev 48. 4 Bac 123.

If one claims under a stat. & deft replies a repeal of stat. pltf may reply another stat. making the first perpetual for the second stat. merely continues the operation of the first. 1 Lev 81. 4 Bac 123.
If Deft plead performance of cov^t & Pltf shows a breach deft can^t rejoin that he was prevented from performing by the pltf. Co Lit 304. 1 Sid 10. 4 Bac 123.
So one can^t plead infancy & afterwards rejoin a release. Tho 442.

But varying in an immaterial point from a previous allegation is no departure. as if one declares on a promise 10 yrs since & the stat of limitation pleaded. replies a promise within six years. Salk 223. 10 Mod 343. 6 Mod 115.

When the decla^n alleges a cause of action in gen^l terms & an evasive plea is made & the pltf in his rep^n makes a more particular assign^t this is no departure. 3 Bl 311. 2 H Bl 555. Bul 17. 3 Wils 20. 1 Saund 28 n).

Departure is bad on gen^l demurrer. Salk 221. Ray 12. 94. Stra 422. 2 Saund 84 a). 2 Wils 96. 1 Ch 623. 6 C 165: or 288. rule doubted. 1 Ch Pl 623. (n). & vide Com Dig Pl. F. 10. 1 Saund 117.

But the defect is aided by verdict. 1 Lev 110. 2 Saund 84. Ray 86. 1 Ch Pl 623. Vide 689.

But the matter alledged in the second plea must be suffic- or judgt will be given vs the party departing. as if rejoinder is, willingness to pay-
Why will not a demurrer aid the departure? It is said that a demurrer confesses what will be found by a verdict. but a demurrer, never confesses what is ill pleaded. the party had no right to make his second plea. 1 Lev 118. 1 Keb 566.

Demurrer.

A demurrer is denial of the sufficiency of the facts pleaded in L. & confesses the truth of the facts & refers the effect of the allegns in law to the decision of the Ct. 3 Bl 314. Co Lit 71(b). Hob 233. Lawes 167-9. 4 Bac 129. 3 Wils 292.
A traverse denies the truth of the allegn a demurrer denies the Law
A Demurrer may be taken to any part of the pleadings Co Lit 72(a). 5 Mod 132.
A demurrer must admit all the allegns even those ill pleaded.
But a demurrer will not admit (so as to estop the party pleading in a subseqt suit) unsuffic facts.
Since 4 & 5th Ann it may be laid down as a genl rule that all formal defects are aided by genl demurrer.. The C.L. was diff. Lawes 167. Hob 56. 232. 1 Wils 248.

If a party alledges a fact contrary to matter of estopple appearing on the record. a demurrer does not confess the fact. Salk 218. Hob 56. 233. 2 Saund 279.

A demurrer never admits a fact which contradicts that which is made certain by something on the record. 3 Lev 124. Cul. 35. Lawes 168.

A demurrer never admits a fact wh is impossible. Ibid 10 Lawes 168. But this rule does not extend to facts wh are fictitious. Com D pl y 5.

A demurrer never confesses a conclusion at Law. Hob 56. 4 Bac 131.

There can be no demurrer after issue joined — but merely closing the issue does not exclude a demurrer. 1 Show 213. 4 Bac 84.

A demurrer tenders an issue in law 3 Bl 314. Co Lit 71-2. 126 a

There cant be a demurrer to a demurrer, the 2d is a discontinuance. Salk R 219. Lawes 172. 2 W R 45-3.

Demurrers are of two kinds, genl & special. a demurrer not assigning specially any particular cause, of demurrer is genl. Co Lit 72. 4 Bac 132.

A special demurrer is now made necessary by 27th Eliz c 5. in many cases in wh at Cl. a genl demurrer wd have been sufft. at Cl a special demurrer was never necessary, tho they were at Cl in frequt use. Saund 337. a Hob 232. 1 Chit 240. 4 Bac 132. Lawes 167. 8.

To constitute a special demurrer the cause of demurrer must not only be assigned — specially assigned. Eg demurrer assigns for cause that the declaron &c is double, multifarious & wants form, this is not special, that in wh the duplicity consists must be stated. Wils 219. Com 297. 2 L Ray 798.

Ld Coke lays it down as a good rule to demur specially in all cases where there is any doubt whether the mistake is in form or substance — this is undoubtedly the safer course. 2 Buls 264. 1 Chit 240.

For a special demurrer reaches all defects wh a gent demurrer wd reach. but defects in form except in dilatory pleas. can be reached only by special demurrer. 10 Co 88. Latch 185. Co Lit 162. Com D pl Q 5-6. 3 Bl 315. Stra 624.

But it is not necessary to demur specially to a dilatory plea. where the defect is merely formal. the stat does not extend to pleas in abatet. 2 Ld Ray 1015. 337. Salk 299. Sid 885. 3 T R 186. 1 Ch Pl 456. 2 Do 679. 682.

The stat of Eliz requires genlly that for all formal defects a special demurrer shall be necessary. the stat of Ann ~~re~~enacts 27 Eliz & adds a greater number of particular instances. 4 Bac 134-6.

But these stats do not extend to crimt appeals. indictts & actions on penal statz. presentments & informations. Com Dig pl. Q 27. 77. 1 Ch Pl 642.
4 Geo 2d extends the rule to actions brot on penal statz 1 Ch Pl. 642.
In all pleadings there are two requisites. 1st that the matter be suffi in law. 2d that these facts be pleaded according to the forms of law. in the first case the demurrer may be gent in the second a special demurrer is necessary Hob 232 Co Lit 303. Hob 164. 2 Ld Ray 798. 882.

If then there is a total want of ~~statement~~ substance as slander for calling one a jew. a gent demurrer is suffi. so if in trover pltf sd not state prop or in trespass possn. the demurrer may be gent. Co Lit 72 (a). 3 H 394. Carth 398. Stra 624. Hob 133. 198. 282. 301.

If a party pleads any thing whh he appears from the face ~~of the face~~ of the record to be estopped from pleading. a genl demurrer to the plea is good if the fact is material. Wils 13. Lanes 38. 148. 161. 70.

A special demurrer reaches no other *formal* defects than such as are specially assigned for cause of demurrer. 10 Co. 88. 4 Bac 182.

Judgt given on a demurrer to a declatn or to any of the pleadings to the action is final, & this judgt is as conclusive in any subseqt action for the same cause as a judgt rendered on a verdict. 2 Bl R 827. 6 Co 7. Peake Ca 36. 10 Mod 207. 10 A R 196.

But if pltf fails because his declatn is ill, on demurrer because he has misconceived his action, he may bring a subseqt action. (c 6).

So if pltf fails on account of an omission of a material allegation, he may bring another action.– vide evidence. (S C). 2 Saund 47. (c). 6 Mod 20. Cro El 667. R. 3 Wils 291.

A demurrer reaches back through the whole record & attaches on the first substantial defect. Com D. P. y 7. Salk 519. Saund 285. n 1. Hob 56. 135. 200. 1 L R 6. 647. 5 Co 59(b). 9 Co 110. Salk 455.

But to this rule there is one exception or rather one class of exceptions Eg. If to debt on bond for the performance of covenants *Etc* & the deft pleads an insufft plea. & the pltf replies witht setting out any sufft breaches, for in these cases the true cause of action never appears till the replicn. so that the repn in all such cases is to be considered as a part of the declatn. & a supplemt to the declatn. 8 Co 120(b). 8 Co 52. 2 Ld Ray 1080. 6 T R 133. 221. 2 Buls. 54.

If of several pleas in bar one is demurred to & is adjudged good. tho all the others sh'd be bad the Deft is entitled to judgt. 1 Saund 80. 2 Bur 787.

In civil cases a judgt rendered on demurrer follows the nature of the pleading demurred to. where judgt then is rendered on demurrer to a dilatory plea the judgt is not final. but same in case of pleas to the action. ink 302. 4 Bac 132.

And the rule is the same in crim. cases if the offence charged is less than felony. But in crim. cases if a demurrer is overruled. the prisoner may still plead if the offence is a felony or a capital offence - opinions are however divided - Co 2e 196. 11 Co 60. 2 Hawk 334. 4 Bl 334.-5. 2 Hale 243. 257. 315.

Demurrer to Evidence.

In many cases where the issue is in fact. one of the parties may take the case from the jury to the Ct. by demurring to the evidence. i.e to the facts shown in evidence, for the demurrer always admits the facts to be true. Co Lit 72. Bul 313. Ray 404. 4 Bac 136.

This demurrer to evidence must be taken before the party demurring has shown any evidence on his own side. 1 Root 570.

Again this demurrer must be taken to the whole evidence exhibited on the other side.

Again a demurrer to evidence can only be taken to the evidence of that party who takes the onus probandi on that issue. Ex Deft pleads the genl issue the pltf takes the onus. the pltf can't demur to the defts evidence for the issue can't be whether the deft has proved himself not guilty.

The relevancy of evidence is always a ques. of L. but the relevancy being established the jury are to determine how far this evidence supports the iſsue. Doug 360. 2 H Bl 205:

To demur to evidence wh is relevant to the whole iſsue, however weak that evidence may be. is a desperate experiment. the demurrer must be overruled. 2 H Bl 205:

Evidence is always relevant to any iſsue wh it conduces in any way to prove. however slight the degree-
This demurrer then puts an end to the iſsue of fact & refers to the Ct the applicatn of the L. to the facts shown in evidence.

The principle advantage of demurring to evidence is to place the evidence on the record & thus to support error.

This demurrer admits the facts shown in evidence by the adverse party but denies the legal sufficiency of these facts to support the iſsue joined. 4 Bac 136. Co Lit 72. 2 H Bl 205-6.
Eg. to debt on Bond non est factum is pleaded & the evidence offered of the execution is hearsay. now the Deft shd demur~~ring~~ if he wishes to bring error. by demurring he admits that the witneſs heard J.S. say the Deft executed the Bond.

In the nature of the thing then the fact wh the witneſs wd testify to must be ascertained before any ques of L can be raised.
The party demurring must then in certain cases make certain admiſsions wh are indispensable for the purpose of raising the ques. of Law. 2 H Bl 205-6.

"When the whole evidence exhibited is written the opposite party may demur. & the other party must join in ~~the~~ demurrer. or waive the evidence. for here is no danger of mistake. 5 Co 104.(a). Cro El 751-2. Co Lit 72. 3 Bl 372. Bul 313.

But how far a party exhibiting parol testimony is bound to join in demurrer to it. has been quite a doubt. Co Lit 72(a). 5 Co 104. 1 Lev 87. Cro El 751-2.

But now the L on this subject is settled.
I Wh the whole testimony rests in parol the parties may by agreemt demur & join in demurr to it Cro El 752
& II If the party taking the onus probandi produces witnesses to prove a definite fact. the other may admit this fact & demur & compel the other party to join in demurrer or waive his evidence. 2 H Bl 206.
Eg In trover under the genl issue the pltff offers evidence to prove the Deft guilty of neglect. If the Deft will admit on the record the fact of neglect he may demur.

If the parol evidence adduced is certain the opposite party may by confessing that evidence on the record to be true demur & compel the other party to join in the demurrer. 2 H Bl 206.
By "certain" is here meant direct evidence as contra distinguished from circumstantial.
If the evidence produced is indeterminate & loose i.e not certain & positive, the opposite party cant demur to it witht admitting it to be certain & determinate as well as true, & unless this admission is made the party offering the evidence is not obliged to join in demurrer: for this wd be referring the matter of fact to the Ct. 5 Co 104 2 H Bl. 207. Bul 313.

Eg. Witneſs says I believe the fact is so according to the best of my recollection. it is suff. here the party demurring must admit the evidence as if the testimony was direct.

If the evidence is circumstantial the party demurring must admit every fact & every conclusion which the other party claim from it & which the evidence conduces in any way to prove. Doug. 114. 127-9. 2 H. Bl. 204. 207. Bull. N.P. 313.

If this admiſsion is not made the Ct. can give no judgt. upon the demurrer even tho the other party shd. join. the Ct. in such case must award a venire de novo. Bull 313. 4 Bac. 137. 2 H. Bl. 209.

The point in iſsue on a demurrer to evidence is whether the evidence is suffᵗ in law to support the iſsue in fact. Hence in a demurrer to evidence no advantage can be taken to the pleadings but after the demurrer to evidence is overruled. advantage may be taken to the pleadings by motion in arrest of judgt. & this motion will then stand on the same ground as a motion in arrest after genl. verdict. so that whatever is cured by verdict is cured by demurrer overruled. Doug. 218.-13. Bul. 313.

The right of demurring to evidence is not stricti juris. the party whose evidence is demurred to may always pray the judgt. of the Ct. whether he ought to join in demurrer & the Ct. may in their discretion refuse to receive such demurrer. Bull N P 314. 4 Bac. 136. 2 H. Bl. 205.

On demurrer to evidence & joinder in it. the usual course is to diſmiſs the jury instanter. but the Ct. may direct the jury to aſseſs the damages conditionally. Cr. Ch. 143. 2 Ray. 60. Plow. 410. Bul. 314. Salk. 284. Doug. 212. 2 H. Bl. 200.

So a party demurring to evidence is prevented from going on in his demurrer by the Ct. the party offering to demur may file a bill of exceptions. 9 to B. 161. Bul. N.P. 249. or 34. 2. Bac 326. 4 Bac 136

The whole proceeding in demurring to evidence is under the of the Ct. as in entering the evidence on the record the admissions &c. 2 H Bl 208. As to the form vide Bul. N.P. 314. 2 H Bl 200.

To arrest judgt is to stay or prevent judgt & this is done by motion for that purpose in writing entered on the record. this usually takes place after an issue in fact found & verdict. 3 Bl 386-93. But such motion may be made after a default. a default merely admits the declaron to be true. So after demurrer to evidence determined. 2 Str 1271. Doug 208. 213. or after evidence determined vs deft.

The principle on wh judgt is ever arrested is this. the judgt of the Ct a conclusion of law from facts appearing on the record. he therefore who on the whole judgt appears not to be entitled to have judgt cant have it.

The issue raised by this motion is an issue in L. for the cause of arresting judgt must be something wh appears on the face of the record. 3 Bl 393.

If the Defts plea on wh he has obtained a verdict discloses no good defence to the action, the pltf if his declaron is good, may arrest judgt. Cro El 778. 3 Bl 395.

To determine what defects are causes of arrest in judgt these rules are to be observed. After a genl verdict judgt may be arrested for any cause wh wd render a judgt in pursuit of the verdict erroneous. 1 Salk 77. 2 Roll 716.

if the statement of the pltfs title or cause of action, & the statemt only is defective, the defect is cured by genl verdict. Eg. in trespass the pltf does not allege a certain day; here the defect is in the manner of stating the trespass. Doug 658 or 671. Salk 365. Bull N.P. 321. Cowp 825. Com D. Pl. C. 87. Stra 1028. 3 Bl 119. 394.
But if no cause of action or a defective one is stated the fault is not cured by verdict & a motion in arrest will prevail. Eg. no consideration in assumpt. Doug 658. 3 Bl 394. Sidn 184.

These rules apply as well to the Defts defence as to the pltfs claim. Eg Deft nt guilty to debt on bond. pltf may arres judgt. 1 T R 145. 3 Bl 395. Cro El 778. 7 T R 518. Bull N.P. 321. 3 Bur 1028. 4 T R 472.
Any defect in the pleadings whh will support a motion in arrest of judgt must be such a one as will support a genl demurrer. but not every defect wht will support a genl demurrer will of course support a motion in arrest. Eg if the declan omit some circumstance witht which the pltf ought not to recover, if the circumstance is implied by the facts found by the verdict, the declan is cured. 9 Bl 393-4. Doug 658. or 671. Carth 389. Cro J 44.

Eg. Declan omits to lay a day on whh the cause of action arose, a genl verdict cures the defect.
So if the value in trover is omitted & the pltf obtains a genl verdict, for the verdict by necessary intendment supplies the omission, it must be presumed that the jury had evidence of the value of the property.

After verdict the Ct must presume those facts whh are omitted & whh are necessarily implied from the facts whh are stated & found, or in other words the Ct. must presume evy fact whh was necessary to warrant the finding of the jury. Cowp 320-1. Doug 658. 1 T R 145. 1 Saund 228. (n. 1.) 2 Dal. 71. & Cowp 827. 1 Wils 172. Stra 1023.

Ex- pltf declares on the grant of an incorporeal hereditament, witht alledging that it was by deed & the jury find a genl verdict in favor of the pltf. the Ct must presume that the grant was by deed, or the Ct must presume that the jury found a grant by deed & by L there can be no proof of a grant except by deed. Salk 662. 130. 5 Mod 287. 7 T R 518. 1 Do 545. 2 Ld Ray 810.

Again- pltf alledges a tort committed on a day after the date of the writ. this is ill on genl demurrer. but if Deft pleads not guilty & a genl verdict is found for the pltf this fault is cured, for evidence of a wrong committed after the date of the writ is legally inadmissable & therefore the Ct will presume that evidence was given to the jury of a tort committed on some day prior to the date of the writ. 1 T R 145. 3 Bur 317. 10 Mod 301. Co Lit 303 (b). Com D. pl. e. 9. Lawes 48. Cro El 401. 8 Co 82 (b). 4 Burr 100.

Nothing can be presumed in support of a genl verdict except those facts whh are alledged & found & such as are necessarily implied from the finding of those facts whh are alledged. 1 T R 145.

If the cause of action then appears to be defective, then the verdict cures no defect in the pleadings. Doug. 680. 3 Burr 1728. 3 Bl. 394.

So if any material fact is omitted & wh. is not inferable from the finding of the facts wh. are alledged. this fact can never be presumed. Salk 365. 1 Ld R 145. 3 Bl 395.
Eg. In assumpt. or cov^t broken if the pltff does not alledge the performance of a condition precedent. the Ct can never presume that this condition is performed. for the finding is merely that the Deft promised & has not performed. the jury may rightly in this case find for the pltf with^t finding any thing more than the promise & breach.

So if notice to the indorser is not alledged. a gen^l verdict does not cure the defect. Doug 658. 671. 7 Co 10 a. 1 BR 645. Ld R 7-8. 7 D&E 125. 4 BR 472. 2 H Bl 574. 2 Bur 900.

So if action is brot vs A for mischief done by his dog & the declar^n omits to state the scienter. & a gen^l verdict is found in favor of the pltff. here the defect is not cured. for this omitted fact does not follow from the finding of all the facts alledged. Salk 652. 3 D&E 12. Doug 658.

For the Ct can never presume any fact omitted merely because that fact is necessary to enable the pleader to prevail in point of L. Once indeed the Ct in Conn determined that a consid^n in assumpt. might after verdict be presumed. Nenle 27. Kirby 403.

A motion in arrest of judg^t after default operates precisely as a gen^l demurrer. nothing is cured by default except that wh. w^d be cured by gen^l demurrer. 2 Bur 900. 2 Stra 1271. 1 Wils 191.

2 Again the Ct can presume nothing in f~~avor~~ of the pleadings after a special verdict. The Ct can presume no material fact found by the special verdict. for the verdict purports to state all that is proved to the jury.

There are cases however in wh judg^t will not be arrested for the greatest defects. & this happens where the first radical defect in the pleadings is on the side of the party moving in arrest, for judg^t is to be rendered on the face of the whole record. Hob 56. 199. 4 Bac 131. 8 Co 120. 133. 2 Ld Ray 1080. 9 Co 110. 3 Lev 244.

When judg^t in pursuance of a verdict is arrested judg^t in chief vs the party who obtained it may in some cases be given this is called a judg^t veredicto non obstante. And this judg^t is given, where from the whole record it is perfectly clear that the party arresting judg^t is entitled to judg^t. Eg The declar^n is wholly insuff^t - verdict for pltf - Deft may arrest judg^t & judg^t will immediately be entered up for the Deft. here a repleader w^d be of no possible use - Bur 251. Hob 56. 9 Co 110. 6 Bro P.C. 517. Hob 199. 206. Bur 301. 8 Co 120. 133.

If issue is taken on an immaterial point where there are material alleg^{ns} wh might have been traversed so that the Ct can^t discover who ought to have judg^t. judg^t may be arrested. & a repleader will be awarded - 2 Saund 319. (n 6) Com D. pl. R 18. Bac Abr pl & pl. M 1 Ld R 632-4. Carth 371. Salk 579. 1 Saund 228 n) 2 Vent 196. 3 Bl 395. 2 Bur 944. 2 Stra 994. Lawes 175-6. Cro El 245. Ray 458. 1 Bur 301-5.

But if a plea is wholly insuff^t & the pltf traverses a part or the whole of it & obtains a verdict, judg^t can^t be arrested. & no repleader will be awarded for it appears on the face of the record that no traverse can be material on this plea 1 Bur 301. 8 Co 133. (b). 120 (b). 4 Bur 2030. Stra 994. Hob 56. 199. 200. 4 Bac. 131. 316.

A repleader is never awarded for a defect wh. can't be cured by any manner of taking iſsue upon it.
And in this, i.e. where the plea in bar is wholly insufft & the verdict is in favor of the Deft judgt will be arrested & given for the pltf. veredicto non obstante. here it wd do no good to award a repleader.
On a repleader awarded the pleadings begin anew & regularly at that stage in wh. the pleadings were defective. E.g. declan good & the plea in bar good. the pltf takes iſsue on an immaterial part of the plea & verdict is for the pltf. the judgt is arrested & a repleader awarded. the pltf must make a new answer to the plea. 3 Bl 395: 1 Bur 301-6. 2 Saund 319 & n. 2 Salk 579. 173. 216. Ray 458. 3 Keb. 664. Cowp 510.

In two authorities it is said if the declan & plea is ill & an immaterial iſsue is taken on it, the repleader commences with the declan. but J.G. can't see how in this case a repleader can be awarded. Salk 579. 4 Bac 126.
It seems however that where a repleader is awarded it is permitted to either party to amend his pleadings. but the rule can't go further than this,

A repleader for the immateriality of an iſsue is never awarded in favor of the party who tendered the immaterial iſsue. Doug. 380. 1 Saund 308. 1 H Bl 664. Cowp 510. Tidd 824. 2 Saund 319. for the fault is his who tenders such iſsue -

In some cases an iſsue if found one way is decisive & if found another is not decisive, now if verdict is such as decides the case there will be no arrest of judgt or repleader. 2 Bur 944. 2 Wils 173. Conn R 148. 4 Bac 66.

A repleader is in genl never awarded after demurrer, for a demurrer in its nature cant be immaterial, it attaches on every & any defect. 3 Co 52. Hob 42. Latch 148. 1 Ch. Pl. 634. (3 Lev. Ab. 440). 4 Bac 159.

If a repleader is awarded where it ought to have been denied, or *vice versa*, it is error. 2 Salk 579. 1 Ch. Pl. 633. 6 Mod 2. 1 Day 27. 132.
Again there can be no repleader after default or discontinuance, for here one party is out of Ct for every purpose except to move in arrest of judgt for a fault in the declarn

At C.L. a repleader was sometimes awarded before trial, but now it seems since the stat of jeofails, in genl a repleader will not be awarded until after verdict, for the Ct will not in genl before hand determine whether a verdict will aid the issue 3 Keble 664. 6 Mod 2. 3 Lev 32. 1 Ch Pl 133. Carth 371. 1 Bac 91. 4 Do 126.-29.

A repleader is never awarded upon a writ of error, the time for a repleader is over after judgt 2 Saund 319. 2 Lev 12. 6 Mod 102.
Judgt may be arrested for defects in the verdict where the pleadings are good, eg. verdict finds only part of the material facts in the pleadings. Cro El 103. Ld Ray 1521. Stra 844. 1089. Com. D. 421.
So if in a special verdict the jury find evidence of a material fact & not the fact itself, the verdict is bad & judgt will be arrested & a *venire de novo* awarded. 1 East 171. 2 Bur 1243. Com. D 590.
But if the jury find the substance of an issue, tho the verdict in terms does not find all, the verdict is good. Co Lit 227. Ventr 27. 12 Mod 5.

2 Vent 194. If the jury find
5 Bac 299.

But a verdict wh. finds all that is material in the issue it is not vitiated by finding more 6 Co 57. Cro El 404. 5 Bac 299.

If the jury assess greater damages than the pltff demands the Deft may move in arrest, but the pltff by releasing the surplus on the face of the record may prevent error & take judgt for the remainder. 10 Co 115: 2 3 R 113. 123. 1 H Bl 643. Esp D. 904. 5 Bac 195: 272.

It seems that if the Ct in such case discover the defect that they may ex officio give judgt for the pltffs demand merely. 4 Bac 25:

If the pltff demand more than by his own showing he is entitled to recover & verdict is given for what he demanded judgt may be averted if the pltff will not on the record remit &c. 4 Bac 26. 1 Rol 785: 2 3 R 113. Esp D 304. 5 Bac 195: 272.

If the jury find a fact specially & then make a conclusion from that fact, the Ct are not bound by that conclusion, tho they are by the facts. 11 Co 10. Hob 53-6. 5 Bac 286

When judgt is arrested for any defect in the verdict a venire de novo is awarded. Doug 362. 8 T R 564. Esp Di 528. 1 T R 508. 532. 2 Hawk 629. Doug 703.

Pleadings.

In Connt judgt has been arrestd for intrinsic causes whh are brot upon the record by testimony offered under the motion in arrest &c. Eg misconduct of the jury. bribery. asking the opinions of others &c. now these are in Eng good causes for a new trial & are here.

There has been a practice in Eng to arrest judgt for misconduct of juries. 4 Bac 288. 291. Stra 642. 1 Freeman 79.

On arrest of judgt for defect in the pleadings no costs are regularly allowed on either side. for he ought to have demurred. Salk 579. 1 Bl R 267. Comb 407. Stra 617. 1 Ch Pl. 196. 633-8-9. 1 Root 69-70-572. 1 Vent 296.

So if a motion in arrest is improperly overruled & the party overruled brings a writ of error the same rules respecting costs prevail. 1 Ch Pl. 638-9.

But this rule holds only when the motion is for a defect in the pleadings, for in other cases there was no opportunity to take the objection earlier than he does take it.

In Eng motions in arrest are made within the four first days of the term after the trial 3 Bl 395:

In Conn the motion is made on the verdicts being accepted by the Ct. & must be reduced to writing & handed to the opposite counsel within 48 hours. 1 Root 574. 3 Day 29. 3 Bl app no 2. page 11.

Gift of
Mr. Fremont Rider
May 27, 1947

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